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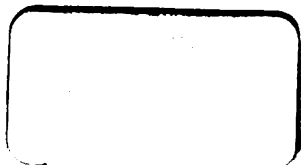
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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

SUBMITTED AT THE MAY TERM, 1893, OF THE THIRD DISTRICT, AND AT
THE FEBRUARY AND AUGUST TERMS, 1893, OF THE FOURTH
DISTRICT, WITH THE REVISED RULES OF THE
THIRD DISTRICT, ADOPTED AT THE
MAY TERM, 1894.

VOL. LII.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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THE APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.
Court sits at Chicago on the first Tuesdays of March and October.
CLERK—Thomas G. McElligott, Ashland Block.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.
ARBA N. WATERMAN, " " "
HENRY M. SHEPARD, " " "

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court,
except Cook county.
Court sits at Ottawa, LaSalle county, on the third Tuesday in May,
and the first Tuesday in December.
CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

JUSTICES.

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Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-
days in February and August.
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JUSTICES.

NATHANIEL W. GREEN, Pekin, Tazewell county.
ALFRED SAMPLE, Paxton, Ford county.
CHARLES J. SCHOFIELD, Carthage, Hancock county.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS

THIRD DISTRICT—MAY TERM, 1893.

**Edward North et al. v. Benjamin T. Roodhouse, by
Prentiss D. Cheney, his Guardian.**

52	17
87	671
52	17
92	1212

1. **COSTS—*In Chancery, Discretionary.***—The statute (Sec. 18, Ch. 88, R. S.), leaves it to the discretion of the court to award costs in all chancery cases, except when the bill is dismissed by the complainant, or on the motion of defendant for want of prosecution. The discretion thus provided for is a sound legal discretion, and should be so exercised as to work no injustice.

Memorandum.—Error to the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

MARK MEYERSTEIN, attorney for plaintiffs in error.

JAMES R. WARD, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
The only question here is as to the action of the court in regard to costs.

The defendant in error filed a bill in chancery for an accounting as to the interest of Peter Roodhouse, deceased, in a partnership engaged in the business of banking.

The partnership was organized by said Peter Roodhouse

and the appellants, Edward North, John North and C. E. Wales; Peter Roodhouse died, leaving his sons, Henry W. Roodhouse and Benjamin T. Roodhouse, his only heirs.

The latter was then an infant of tender years, and his brother, Henry W., was appointed his guardian. Afterward, when the minor attained the age of fourteen, he chose P. D. Cheney to act in that capacity.

The surviving partners made no report to the County Court showing an inventory of the partnership property, but they made a settlement with Henry W. Roodhouse, the first guardian, for and on account of the interest of the ward in the partnership affairs.

The present guardian, not certain whether the interest of the ward had been properly cared for, applied to the surviving partners for a statement of the affairs of the partnership, but was denied access to the books and then filed the bill for an accounting.

Upon a hearing, the court found the issues for the defendants and dismissed the bill, but so divided the cost of the proceeding as to require each one of the surviving partners to pay one-fourth of the same.

The statute, Sec. 18, Ch. 33, leaves it to the discretion of the court to award costs in all chancery cases, except when the bill is dismissed by the complainant, or on the motion of defendant, for want of prosecution. The discretion thus provided for is a sound legal discretion, and should be so exercised as to work no injustice.

We are not prepared to say the court erred in this respect. The failure of the surviving partners to file an inventory of the estate of the firm in the County Court, made it proper for the guardian to ascertain whether his ward had any further interest in the assets of the firm, and the refusal to permit him to investigate the books, was a justification for the filing of the bill. Had the proper inventory been filed, as required by law, no such proceedings would have been necessary.

The court knowing all the details of the case, some of which do not appear on paper, such as the willingness

Burnett v. Luttrell.

or unwillingness to proceed to trial, and other matters of that sort, may have felt that there were special reasons for the course taken. Certainly we can not say the discretion was abused.

On the contrary we are inclined to think it was properly exercised. Affirmed.

Isham Burnett v. John W. Luttrell.

1. **CRIMINAL CONVERSATION—Burden of Proof.**—In actions for criminal conversation, the burden of proving the alleged guilt of the defendant is upon the plaintiff.

2. **INSTRUCTIONS—Refusal to Give, Not Always Error.**—It is not error to refuse an instruction when the principle of law contained in it is embodied in others given.

3. **EVIDENCE—Of Defendant's Wealth in Criminal Conversation Cases.**—The refusal to admit evidence of the defendant's wealth in an action for criminal conversation is not reversible error when the jury find that the plaintiff has sustained no damages.

Memorandum.—Action for criminal conversation. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 4, 1893.

The opinion states the case.

M. T. LAYMAN and R. YATES, attorneys for appellant.

CHARLES A. BARNES and MORRISON & WORTHINGTON, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action on the case for *Crim. Con.* commenced in February, 1872, by appellant against appellee, which was tried by jury and resulted in a verdict and judgment for the defendant.

The parties are brothers-in-law, appellee's wife being appellant's sister. They lived on adjoining farms, and the families were intimate for many years, until September, 1891, when appellant, unseen and laboring under suspicions, saw his wife and appellee together in the yard, under circumstances which, if as he states them, would indicate an improper intimacy. He then made a violent assault upon appellee, afterward filed a bill for divorce, which he dismissed, and then another, to which an answer and cross-bill for separate maintenance were filed, all of which were dismissed and settled by an agreement for separation and for disposition of the property they owned.

The case made for appellant consisted largely of acts of personal familiarity, occurring from time to time during a period of seven years before suit brought—some half dozen in all—which might have been entirely innocent, considering the relations of the parties, but easily misconstrued, exaggerated or perverted by a prejudiced, depraved or suspicious mind. Each was testified to by a single, uncorroborated witness, and was denied, explained or not remembered by appellee, no other, competent to testify, being claimed to have been present; and as to some of them, there were other circumstances tending to impeach their accuracy or their credibility.

In addition to these instances of alleged improper intimacy, three others were testified to, which, if true, admit of no explanation consistent with innocence; one by a man whose wife was a sister of appellant, one by his wife and the other by his son. Each of these men was confessedly playing the part of a spy, with suspicions already entertained. They had removed to Kansas, where their depositions were taken after they had been seen by appellant and had given him their affidavits. The general reputation of each for veracity was fairly impeached. It was from intimations by the son that appellant got the idea of the wrong here charged. He was separated from his own wife in December, 1891, after a cohabitation of less than three years, and his testimony, as it appears in the record, indicates an

Burnett v. Luttrell.

element of character, other than for truth, which might also go to discredit him. The act testified of by his mother, though an improper liberty, and not resented as it deserved to be, might have been misapprehended by the witness; nor would it, of itself, have warranted the conclusion claimed. It did not interrupt their social relations.

Appellant's wife could not be a witness in the case, but he introduced in evidence, over appellee's objection, their agreement for separation, from which it may be inferred that she declared her innocence under oath; for it recites that she had obtained an injunction against him on her bill for separate maintenance. So far as appears she had always borne a good character as a wife, and was the mother of seven children.

Appellee also had reached a time of life at which the passions of men generally are cooled, and was the father of five children, of whom two were dead and two married. His relationship to appellant's wife, while it justified some freedom of manner in his personal association with her, especially forbade and repelled all inclination to the act here charged. He emphatically denied the statements of appellant and his witnesses so far as they imputed to him any impropriety in his conduct with or toward her, or that any was at any time committed or intended. He gave his version of what took place on the occasions referred to by him and them, so far as he admitted having any remembrance of such occasions, which was innocent and not unnatural or improbable in itself. Of some he disclaimed all recollection, and denied the occurrence of others.

Four or five testified to statements made by appellant out of court, tending to contradict or weaken his testimony, all of which he denied.

It is deemed unnecessary to state the evidence at greater length. Having considered it all, with the aid of counsel's suggestions, we are satisfied that it fairly supports the verdict. In no kind of case is the juror's advantage in seeing and hearing the witnesses greater, or their finding to be more respected than in this.

Were they deprived of any proper means of reaching the truth, or materially misled as to their proper use, in any particular, by error of the court?

Appellant was not allowed to state what he was worth when he made the agreement with his wife for their separation. We understand that such evidence is admissible in such cases generally. Here it was the last item offered in chief, and he was recalled to prove it. He had been examined at length without directly touching this point, and had put in evidence the agreement itself, which showed enough as to his pecuniary condition, for all legitimate purposes of the question. The court has some discretion as to allowing a witness to be recalled. If it was not properly exercised in this instance, what was the harm? The evidence was admissible with sole reference to the measure of damages. If there were no damages it would have been useless, and the jury found that there were none.

Mrs. Ogan, a witness for appellant, identified a note received by her through the mail, without signature and in an unknown hand, stating in substance that the writer had heard appellee say he would give her a liberal reward if she would keep still and not appear on the trial against him. It was offered in evidence and we are surprised to learn that its rejection is complained of. It had no quality of evidence. An instruction asked for appellant was refused, as "duplicated and triplicated," but counsel say they find no other in the case which declares that plaintiff may recover damages "for the shame and disgrace of his children."

Three other instructions, which were given, told the jury what they might consider in estimating the amount of plaintiff's damages, if any; among which in one was "the mortification of the husband and his sense of shame," in another "his mental suffering from the dishonor of the marriage bed," and in the third "the social position of the parties and the family of plaintiff."

If the one refused really meant that he "could recover for the shame and disgrace of his children," we do not concede its soundness. If it means that he could recover for his

Lee v. Yanaway.

own suffering from their shame and disgrace, which is a more accurate statement, we think it is substantially given in each of the other three.

The refusal of another (numbered 7), also complained of, was not error, for the same reason.

Six instructions were given as asked for appellee. By the first it was announced that the burden of proof was on the plaintiff, "to show to the satisfaction of the jury the alleged guilt of the defendant as charged," while by the last it was twice distinctly stated that only "a preponderance of the evidence" was required. Neither of the others contained anything on that subject, nor did any of those given for appellant.

The measure of proof was inaccurately stated in appellee's first; but it is hardly possible to suspect that it may have misled the jury or that the error affected, much less produced, their finding. The sixth told them correctly what measure of proof should satisfy them, and we can not doubt that this was understood to be in affirmance of the position we may feel sure was taken by counsel on both sides, in argument. Believing that appellant was not materially prejudiced by any ruling or by the giving or refusal of any instruction, by the court, and that justice has been done by this judgment, it will be affirmed.

Mahlon B. Lee v. S. S. Yanaway.

59	23
61	334
52	23
e113	s498

1. **ACCOUNT—*Judgment in Action of.***—The judgment that the defendant do account in an action of account is interlocutory and not final. It determines nothing beyond a liability to submit to an accounting. The final judgment in actions of account where the verdict is that the defendant is liable to account, is upon the report of the auditors.

2. **APPEALS—*From an Order to Account.***—An order to account entered in an action of account is an interlocutory order from which an appeal does not lie.

3. **JUDGMENTS—*What Are Not Final—Award of Costs.***—That a judg-

ment is final is not to be determined inferentially from the mere fact that costs and execution thereof are adjudged against one of the parties. The costs are regulated by statute and follow as an incident to final judgment. But the character of the judgment, whether final or interlocutory, is to be determined from other considerations than that it awarded costs. It must, to be final, terminate and completely dispose of the action.

4. *Costs—Not to be Awarded Until Final Judgment.*—In actions of account there is no warrant in law for adjudging costs against a party resisting his liability to account. Upon an interlocutory order to account, costs can not be awarded until final action is had upon the report of the auditors.

Memorandum.—Action of account. Appeal from an order of the Cumberland County Circuit Court requiring appellant to account; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the May term, 1898, and appeal dismissed. Opinion filed November, 4, 1898.

The opinion states the case.

S. S. WHITEHEAD, attorney for appellant.

E. N. RINEHART, attorney for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action of account brought by the appellee to compel settlement of accounts and dealings alleged to be unadjusted between the appellee and appellant as co-partners. The pleas of the appellant presented as a defense that he was not liable to account. This issue was submitted to a jury as required by Sec. 6, Chap. 2, R. S. The verdict was adverse to the appellant, and his motion for a new trial was overruled, to which he excepted.

Whereupon the following order was entered: "And the court orders that M. R. Lee, the defendant, do account to plaintiff, S. S. Yanaway, and that he pay the costs in and about this suit expended to be taxed by the clerk, and that execution issue for the costs accrued in the case. This is an appeal from such order and judgment.

The judgment that the appellant should account was merely interlocutory, not final. It determined nothing beyond a liability to submit to an accounting. The final judg-

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ment in actions of account where the verdict is that the defendant is liable to account is upon the report of the auditors. *Lee v. Abrams*, 12 Ill. 111. It is familiar law that an appeal can be taken from a final judgment only.

The judgment appealed from is against the appellant for all costs accrued and awards execution against him for the collection of such costs. It is insisted a judgment awarding costs is necessarily final.

That a judgment is final is not to be determined inferentially from the mere fact that costs and execution thereof are adjudged against one of the parties. The costs are regulated by statute and follow as an incident to final judgment, but the character of the judgment, whether final or interlocutory, is to be determined from other considerations than that it awarded costs. It must, to be final, terminate and completely dispose of the action. *Ex parte Thompson*, 93 Ill. 89; *Hunter v. Hunter*, 100 Ill. 519; *Black on Judgments*, Vol. 1, Sec. 31.

The judgment that the appellant should account was but the determination of an intermediate issue upon which the further action of the court depended.

Hence, the appeal did not operate to bring before us the errors, which it is alleged intervened in the course of the trial of that issue before the jury. If the final judgment of the court in the action makes it necessary, the appellant may bring up such questions for review, together with all other supposed errors, in the future course of the proceeding, but the rules of law do not permit him to appeal at each stage in the proceedings, and thus present the case piecemeal and greatly multiply litigation.

We know of no warrant in law for adjudging costs against the appellant until final action is had upon the report of the auditors.

Appellant insists that the appeal brings up that question and urges that the judgment as to costs should be reversed.

The general rule that the parties should bring the whole case before an appellate court at one time is so salutary that it ought not to be departed from.

If exceptions to this general rule exist at all, it is only, to quote from Elictt on Appellate Procedure, Sec. 35, "When the peculiarities of the case are so strong and so well marked as to leave little doubt that it is a case of such unique character that it can not be brought under the general rule without doing injustice."

The action in the case at bar is yet before the Circuit Court *in fieri*. It is fully within the power of the presiding judge to vacate the order for costs and thus obviate or correct the error.

It does not appear from the record that the attention of the judge was at the time or has since been directed to the question of the order for costs, or that he did then or has since distinctly ruled that such judgment was proper and lawful. It is quite probable that the order for costs resulted from clerical inadvertence, and that injustice may be easily avoided by invoking the action of the court wherein the case is yet pending. The appeal was improvidently taken and must be dismissed.

Henry D. O'Neil, Sheriff, v. Patterson & Co.

F. E. Chiles, Constable, v. Patterson & Co.

52	26
55	649
52	26
67	865

1. CHATTEL MORTGAGES—*Power of Mortgagee to Seize the Goods*.—A chattel mortgage containing a clause authorizing the mortgagee to take possession of the mortgaged property, to declare the mortgage debt due, and to foreclose it by selling the property at public or private sale if he shall feel "unsafe or insecure," is sufficient authority for seizing the property where the mortgagor absconds and leaves it unprotected.

2. CHATTEL MORTGAGE—*When Not Fraudulent*.—A chattel mortgage providing that the mortgagor "may retain possession of and keep and use the goods and chattels until default," etc., is not equivalent to one authorizing the mortgagor to retain possession of the property and sell and dispose of it in the due course of his business and trade as a retail dealer.

3. CHATTEL MORTGAGES—*When Good as Between the Parties*.—A chattel mortgage authorizing the mortgagor to retain possession of the property and sell and dispose of it in the due course of his business and

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trade as a retail dealer, though fraudulent as to creditors, is valid as between the parties; default being made in the condition of such a mortgage where possession of the goods passes before attachments are issued, the lien becomes complete against creditors in like manner and to the same extent as it would, had the possession passed at the time the mortgage was given.

4. **CHATTEL MORTGAGES—Possession Lawfully Taken—Effect of.**—When the mortgagee lawfully takes possession of the mortgaged property under the provisions of the mortgage, the possession so obtained is absolute and perfect whether obtained with or without the consent of the mortgagor.

5. **CHATTEL MORTGAGES—A Conditional Sale, etc.**—A chattel mortgage is a conditional sale—the condition being the payment of a debt. The conditional title of the mortgagee becomes absolute upon default in payment of the debt—and the mortgagor may then seize the property and sell and transfer the absolute title to a purchaser.

6. **BONA FIDE PURCHASER—When He Takes the Title.**—A *bona fide* purchaser, from even a fraudulent vendee, will take the title free from the vendee's frauds.

Memorandum.—Replevin. Appeal from the Circuit Court of Macoupin County; the Hon. JAMES FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

APPELLANT'S BRIEF, R. P. WILLIAMS, AND J. B. SEARCEY,
ATTORNEYS.

A chattel mortgage on a stock of goods where the mortgagor continues to sell in the usual course of trade, is fraudulent and void as to creditors. *Huschle v. Morris*, 131 Ill. 587; *Webber v. Mick*, 131 Ill. 526.

A mortgage on a stock of goods allowing mortgagor to retain stock and buy and sell, is void as to creditors. *Davis v. Ransom*, 18 Ill. 396; *Dunning v. Mead*, 90 Ill. 376; *Yager v. Messinger*, 15 Brad. 262.

A chattel mortgage which, by its condition, permits the mortgagor to remain in possession of the property, and to deal with it as his own, disposing of it by sale in due course of trade, is fraudulent in law as to the creditors of the person making the same, and as to subsequent purchasers, and is absolutely null and void as to them, without reference to

the *bona fides* of the mortgage debt, or the intention of the mortgagor as to fraud. If the power of disposition does not appear upon the face of the mortgage, but it is so understood or agreed by the parties at the time the mortgage is executed, it is equally void. *Collins v. Meyers*, 16 Ohio St. 547; *Freeman v. Rawson*, 5 Ohio St. 218; *Griswold v. Sheldon*, 4 N. Y. 581; *Twynes' Case*, 3 Co. 80; *Ryall v. Rowles*, 1 Ves. Sr. 348; *Addington v. Etheridge*, 12 Gratt. 436; *Ball v. Slafter*, 26 Hun 353; *Smith v. Cooper*, 27 Hun 565; *Bainbridge v. Richmond*, 17 Hun 391; *McLachlan v. Wright*, 3 Wend. 348; *Drover v. McLaughlin*, 2 Wend. 596; *Wood v. Lowry*, 17 Wend. 492; *Stoddard v. Butler*, 20 Wend. 507; *Edgell v. Hart*, 13 Barb. 380; *Edgell v. Hart*, 9 N. Y. 213; *Gardner v. McEwen*, 19 N. Y. 123; *Mittnacht v. Kelley*, 3 Keys, 407; *Russell v. Winne*, 47 N. Y. 591; *Southard v. Benner*, 72 N. Y. 424; *Brackett v. Harvey*, 91 N. Y. 214; *Coburn v. Pickering*, 3 N. H. 415; *Raulett v. Blodgett*, 17 N. H. 298; *Putnam v. Osgood*, 52 N. H. 148; *Horton v. Williams*, 21 Minn. 187; *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Denster*, 23 Wis. 136; *Bishop v. Warner*, 19 Conn. 460; *Walter v. Winner*, 24 Mo. 63; *Stanley v. Bruce*, 27 Mo. 269; *Armstrong v. Tuttle*, 34 Mo. 432; *Lodge v. Samuels*, 50 Mo. 204; *White v. Graves*, 68 Mo. 218; *Welsh v. Bickey*, 1 Pa. 57; *Homer v. Geesman*, 17 S. & R. 251; *Williams v. Lord*, 75 Va. 390; *Mann v. Flower*, 25 Minn. 500; *Lund v. Fletcher*, 39 Ark. 325; *Davis v. Ransom*, 18 Ill. 396; *Barnet v. Fergus*, 51 Ill. 352; *Dunning v. Mead*, 90 Ill. 376; *Huschle v. Morris*, 131 Ill. 587.

"Creditor," within the meaning of the rule, is not limited to those only who have issued process, but includes all who have *bona fide* claims. 1 *Bouvier Law Dict.* title, Creditor.

If a conveyance of property is made with a fraudulent intent and object, it is not purged of the fraud because there may also have been some other object in view, such as the discharge of a debt due the grantee. *Hansen v. Dennison*, 7 Brad. 73.

A conveyance made to one who is a creditor of the vendor, if made under circumstances of suspicion, and tainted with fraud in law is void. *Bostwick v. Suber*, 13 Ill. 399.

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Although fraud can not be presumed without proof, yet it need only be proven like any other material fact, and whenever it exists it must generally be proven by showing such facts and circumstances as will justify the inference of a fraudulent intent or motive. *Reed v. Noxon*, 48 Ill. 323.

Every sale, assignment or conveyance of property made by the parties to it, with intent to hinder, defraud or delay creditors existing at the time, as to the collection of their debt, is void as to such creditors, whether such sale, assignment or conveyance was made with or without a valuable consideration therefor. *Boies v. Henney*, 32 Ill. 130.

A creditor who, to secure debt, takes title by purchase from debtor's fraudulent grantee, takes only such title as debtor had, and other creditors may assail whole transaction for fraud. *Waggoner v. Cooley*, 17 Ill. 239.

Where property is transferred by a debtor with intent to defraud, hinder or delay his creditors, and the transferee has knowledge of facts and circumstances from which such intent is reasonably and necessarily inferable, the transfer will be fraudulent and void as against such creditors. *Boies v. Henney*, 32 Ill. 130.

Where a purchaser has sufficient information to lead him to the knowledge of a fact, he shall be deemed cognizant of that fact. *Doyle v. Teas*, 4 Scam. 202; *McDoyle v. Reed*, 4 Scam. 117; *Merrick v. Wallace*, 19 Ill. 486; *Rupert v. Mark*, 15 Ill. 541; *Brown v. Guffney*, 28 Ill. 149; *Ross v. Hale*, 26 Ill. 104; *Morrison v. Kelley*, 22 Ill. 610; *Hatch v. Bigelow*, 39 Ill. 546.

Whatever is enough to excite attention and put a party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led, and every usual circumstance is a ground of suspicion and prescribes inquiry. *Russell v. Ranson*, 76 Ill. 167; *Harper v. Ely*, 56 Ill. 179; *Henneberry v. Morse*, 56 Ill. 394; *Babcock v. Lisk*, 57 Ill. 327; *Flint v. Lewis*, 61 Ill. 299.

APPELLEE'S BRIEF, R. B. SHIRLEY, ATTORNEY.

If the mortgagee obtains possession under the mortgage before any other rights attach he will hold the same posi-

tion he would if the possession had passed to him at the time the mortgage was given. *Frank v. Miner*, 50 Ill. 444; *Chipron v. Ferkert et al.*, 68 Ill. 284.

A fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud. 8 Am. and Eng. Ency. 861.

Where a mortgage is fraudulent and made to hinder and delay creditors a *bona fide* purchaser of the property will not be affected by the fraud, and the jury can not, from the mere fact that the mortgage had been so made, infer that the purchaser was a party to it or had notice of it. *Brown v. Riley*, 22 Ill. 45.

Where a person who has purchased goods upon false and fraudulent representations sells them to an innocent purchaser for value before they are reclaimed by the vendor, such innocent purchaser will acquire a valid title. *Schweizer v. Tracy*, 76 Ill. 345.

Neither idle gossip nor vague reports will affect the purchaser's conscience or put him upon inquiry. Notice to affect him must be of such a character that a disregard of it would be a fraud. *Mason v. Trustees of Schools*, 11 Brad. 454.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

On the 31st day of October, 1892, appellees purchased a stock of hardware from one George Robinson, who delivered possession thereof at once to them. On the 12th day of November of the same year the appellant O'Neil, as sheriff, and appellant Chiles, as constable, by virtue of certain writs of attachment in their hands against one George R. Cunningham, levied upon and took possession of such hardware, as being the property of, or as subject to attachment as the property of, said Cunningham. The appellees brought an action of replevin against each of the officers to recover the goods. These actions were consolidated and tried by the court without a jury. The appellees prevailed and judgment in replevin and for costs followed, to reverse which, this appeal was taken.

Cunningham, defendant in the writs of attachment, once owned the goods in dispute. He executed a chattel mortgage upon them to one J. R. Shelton, which contained a clause authorizing the mortgagee to take possession of the mortgaged articles, declare the mortgaged debt to be due, and to foreclose the mortgage by selling the property at public or private sale if he should feel "unsafe or insecure." Cunningham absconded, or at least disappeared for a time, and left the mortgaged goods so unprotected that the mortgagees, upon quite sufficient grounds, deemed themselves insecure, and by virtue of the authority given by the mortgage sold the goods to Robinson, who received possession of them and sold and delivered them to the appellees. Some ten or twelve days afterward the writs of attachment were issued.

The appellants insist that the chattel mortgage was fraudulent in point of fact, because, as they urge, there was only a pretended and not a real indebtedness secured by it, and that it was executed to hinder and delay creditors of the mortgagor and that it was fraudulent in law, because, as they contend, it contained a provision authorizing the mortgagor to retain possession of the property and sell and dispose of it in the due course of his business and trade as a retail dealer in hardware. Appellants further contend that the proofs showed that the appellees bought with knowledge of the alleged fraudulent character of the mortgage, and are for that reason not to be regarded as *bona fide* buyers. The court, in the second proposition of law, held that if the appellees had or were chargeable with notice of such alleged fraud, they were not to be treated as innocent purchasers, and as the finding was for the appellees, it is manifest that the court either did not regard the alleged fraud as proven by the evidence, or did not find from the evidence that appellees had or were chargeable with notice thereof. The evidence upon each of these propositions was, to say the least, conflicting, and upon familiar principles the conclusion of the court as to the weight or preponderance of evidence is to be accepted by this court as the correct determination of the questions. Appellants argue that the mortgage is a link in the chain of title of the appellees to

the goods, and that they are therefore chargeable with notice of the provision of the mortgage permitting the mortgagor to sell and dispose of the goods in his retail trade, and that such provision of itself rendered the mortgage fraudulent and void in law. We do not think the mortgage does so provide. The mortgage does provide that the mortgagor "may retain possession of * * * and keep and use the said goods and chattels until default," etc., and the supposed right given to sell and dispose of them rests upon a labored argument that the only use to be made of such articles is to sell them. Another clause in the mortgage provides that if "the mortgagor shall sell or assign the goods and chattels or any interest therein" the mortgagee may at once declare the mortgage debt to be due, and take possession of and sell the property and foreclose the mortgage. When the instrument in all of its parts is considered it seems clear that the appellant's construction of it can not be upheld.

If it were otherwise we understand that the mortgage would be valid as between the parties, and that as default was made and the conditions of the mortgage broken, so that the possession of the goods passed under it before the writ of attachments was issued, the mortgage lien became complete against creditors in like manner and to the same extent as it would had the possession passed at the time the mortgage was given. This principle is, we think, announced in *Frank v. Minor*, 50 Ill. 444; *Chepron v. Ferkert*, 68 Ill. 284; *Gaar, Scott & Co. v. Hurd*, 92 Ill. 315; *Jones on Chat-tel Mortgages*, Sec. 178; *Tiedeman on Sales*, Sec. 326. This rule appellant thinks is limited to cases where the possession is obtained by the consent of the mortgagor. We think no such distinction is to be drawn.

When the mortgagee may lawfully take possession of the mortgaged property under the provisions of the mortgage, the possession so obtained is, we think, absolute and perfect, whether obtained with or without the consent of the mortgagor, or rather such possession is, with his consent, expressly given by the terms of the mortgage.

A chattel mortgage is a conditional sale, the condition being the payment of a debt. The conditional title of the mortgagee becomes absolute upon default in payment of the debt, and the mortgager may then seize the property and sell and transfer the absolute title to a purchaser. Tiedeman on Sales, Sec. 221-326.

The mortgagor, in the case at bar, consented by the express terms of the mortgage that this might be done. By other provisions of the mortgage, the mortgagee was authorized to declare the debt to be due upon certain contingencies. This power he lawfully exercised, seized and sold the goods and thereby clothed Robinson with all the *indicia* of title. The appellees being *bona fide* purchasers from Robinson, took the title to the goods free from any defects that might have affected, injuriously, his title.

It is well settled that a *bona fide* purchaser, from even a fraudulent vendee, will take the title free from the vendee's frauds. Tiedeman on Sales, Sec. 327; 8 Amer. & Eng. Ency. of Law, page 833; Schweizer v. Tracy, 76 Ill. 345; Brown v. Riley, 22 Illinois, 45; 21 Amer. and Eng. Ency. of Law, page 569.

The propositions of law held by the court are in harmony with the views we entertain as to the rules of law governing the questions involved, and as there is no manifest reason why we should not accept the finding of the court upon the question of fact, the judgment must be, and is, affirmed.

Phoenix Mutual Life Insurance Company and Lewis L. Lehman v. George Arbuckle.

1. ABUSE OF LEGAL PROCESS—*What is.*—Where process has been used for the purpose the law intended it to effect, and without any ulterior unlawful purpose, it can not be said to have been abused. But if it is so used maliciously, and without any honest and reasonable belief of a right to so use it, the person against whom it has been employed, if damaged thereby, may have his action to recover such damages.

2. **MALICIOUS USE OF PROCESS—*Nature of the Action.***—The action for a malicious and wrongful use of process and a recovery of damages is allowed only when it is made to appear that the use, though legal in form and procedure, was, in fact, wrongful, and that the defendant did not employ it in the honest and reasonable belief that it was just for him to do so, but was actuated and moved by malice.

3. **MALICIOUS USE OF PROCESS—*When a Recovery May Be Had in the Absence of Malice.***—If the property of a defendant is seized by the wrongful use of process, and such property injured by such seizure or by a custodian having charge of it under the process, recovery may be had in the absence of malice or without regard to the motives that actuated the person at whose instance the process was used.

4. **MALICIOUS USE OF PROCESS—*Measure of Damages.***—In cases where property has been seized by the wrongful use of process the measure of damages is limited to the special injury and damages to the property.

5. **DAMAGES—*Measure of in Cases of Wrongful Use of Process.***—Payment of legal costs is the measure of the liability in case of an abuse of process, unless malice and want of reasonable or probable cause may, under the peculiar circumstances of the case, create an exception.

6. **LEGAL PROCESS—*Wrongful Use of.***—Persons charged with the wrongful use of legal process are not to be judged by the actual state of the case in law or in fact, but upon their honest and reasonable belief as to the facts and the legal effect thereof.

Memorandum.—Case, for the wrongful use of legal process. Appeal from the Circuit Court of Coles County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

STATEMENT OF THE CASE.

The appellee, Arbuckle, gave the appellant company his note for \$7,000, dated 2d day of March, 1885, due five years thereafter, to which was attached a warrant of attorney authorizing the confession of a judgment in case of default in its payment. To secure such payment appellee executed and delivered to Lewis L. Lehman, as trustee for the appellant company, a mortgage or trust deed on lots 51 and 52 in Paris, Ill.

On the 1st day of June, 1889, the appellee sold and conveyed the lots to one Michael Leinan, subject to the mortgage debt to the appellant, which debt Leinan assumed to pay. In February, 1890, Leinan conveyed the same property to Owen S. Jones, who received the lots subject to the mortgage debt which he assumed to pay.

On the 10th day of March, 1890, the note given by appellee to the appellant being unpaid, judgment thereon was by virtue of the warrant of attorney, entered by confession in the Coles Circuit Court, and on the same day at the instance of the appellant Lehman, execution was issued upon the judgment and placed in the hands of the sheriff of Jefferson county, to whom it was directed, with directions to levy upon the real estate of the appellee, and after assigning to him a homestead, sell the remainder to obtain satisfaction of the execution. By a deed from Jones dated March 11, 1890, but acknowledged on the 29th day of March, the appellant Lehman received title to the mortgage lots in Paris "subject to the incumbrance of the mortgage debt." The sheriff of Jefferson county, in pursuance of the instructions given him, proceeded with the execution. The homestead of the appellee was assigned to him and the remainder of his lands levied upon on the 27th day of March, 1890, and advertised to be sold on the 26th day of April, 1890, at public outcry, to the highest bidder. The appellee contended that the purchase by Lehman, trustee of the appellant company, of the mortgaged premises, subject to the mortgage debt, in legal effect discharged and paid such debt, and he applied on the 22d day of April, 1890, for, and obtained from the Coles Circuit Court, an order staying further proceeding under the execution, and at the same time obtained an order opening up the judgment rendered against him by confession and permitting him to file pleas to the declaration filed in that proceeding and to contest the right of plaintiff to a judgment. Nothing further was done by virtue of the execution, and the issues formed by the pleas in the proceeding for judgment by confession were in due time heard, the result being favorable to the appellee. The court ruled that the conveyance to Lehman, subject to the mortgage debt, operated to extinguish the indebtedness, and thereupon rendered judgment for appellee for costs, which judgment stands in full force and not questioned. The appellee then instituted this action on the case against the appellant Insurance Co., and Lehman, its trustee, to re-

cover damages alleged to have been inflicted upon him by entering the judgment by confession, and the effort to bring his real estate to sale by virtue of the execution issued on such judgment, and by the suit in the court for judgment after he had been permitted to defend by the order of the court. The damages claimed were for injury to the financial standing and credit of appellee, and attorney's fees and other expenses paid or incurred in and about the proceeding to open and defend against the judgment.

A trial before the court and a jury in the case at bar, resulted in a verdict and judgment against the appellant company in the sum of \$700, to reverse which they bring this appeal.

E. P. ROSE and J. F. HUGHES, attorneys for appellants.

APPELLEE'S BRIEF, WILEY & NEAL AND F. K. DUNN,
ATTORNEYS.

In an action for abuse of legal process, it is not necessary to aver or prove that it was sued out maliciously and without probable cause. *Barnet v. Reed*, 51 Pa. St. 190; *Page v. Cushing*, 38 Me. 523; *Wood v. Bailey*, 11 N. E. Rep. 567; *Granger v. Hill*, 4 Bing. N. C. 212; *Wicker v. Hotchkiss*, 62 Ill. 110; *Meyer v. Walter*, 64 Pa. St. 283; *Prough v. Entriiken*, 11 Pa. 81; *Muns v. Dupont*, 1 Am. Lead. Cas. 223; 1 *Hilliard on Torts*, 465.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The appellants regarded the conveyance of the mortgaged premises to Lehman subject to the indebtedness secured by the mortgage as a satisfaction of such indebtedness to the extent only of the value of such premises. The appellee insisted that its legal operation was to satisfy and fully discharge the entire indebtedness without regard to the value of the property.

Under the advice of counsel, learned in the law and authorized to practice in the courts, the appellants proceeded to take judgment by confession to issue execution thereon,

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and to cause the same to be levied upon appellee's property, leaving it to him to proceed by such course as he might be advised was most desirable and proper to bring before the courts the question as to the legal effect of the conveyance to Lehman. The result was a hearing in the Coles County Circuit Court and an adjudication adverse to the position of the appellants. The case at bar was instituted by the appellee to recover damages for the injury to his financial standing, credit and good name, inflicted, as he alleges, by the confession of the judgment, the issuance of an execution thereon, the levy of the same upon his land, the assignment of a homestead to him and the public notice given by the sheriff that his property would be exposed for sale at public outcry, the expenses, by way of attorney fees and otherwise, necessarily by him incurred in securing from the court a stay of proceedings under the execution and in presenting his ground of defense against the judgment to the court.

The instructions given to the jury in behalf of the appellee were framed upon the theory that it was immaterial whether the appellants were actuated by malice in the institution and prosecution of the proceeding to obtain the judgment by confession thereon and the levy, etc., thereunder, or in resisting in the courts the lawful efforts of the appellee to defeat their right to a judgment. Instructions asked by the appellants to the effect that the plaintiff could not recover, unless the jury believed from the evidence that the defendants were so actuated by malice, were refused by the court.

Counsel for appellee insist that the action is to recover damages for an abuse of legal process and that in such cases it is not necessary to aver or prove that the process was sued out or used maliciously or without probable cause, and for that reason the rulings of the court on the instructions were proper. It has been held that in an action for an abuse of process, both malice and want of probable cause will be implied if an abuse is proven. Such holdings are mentioned with apparent approval in *Walker v. Hotchkiss*, 62 Illinois,

107. Judge Cooley in his work on Torts says, that it is enough to show that the process was *willfully* abused to accomplish some unlawful purpose. Cooley on Torts, 221.

It does not seem to us necessary to examine this contention or attempt to harmonize a conflict that at least apparently exists in the decisions of courts and works of law writers upon it, for we do not think the evidence established or tended to establish an abuse of the process of the law.

We understand that process is deemed to have been abused when it has been employed to accomplish some purpose which the process was not intended by law to effect, or where it has been used in the mode and manner designed by law, but with an ulterior purpose to effectuate some unlawful collateral end, the legal use of it being but ostensible, while the real design was to pervert its force and efficiency to the success of the unlawful collateral design. 1 Amer. & Eng. Ency. of Law, 49; *Mayer v. Walter*, 64 Pa. St. 288.

Where process has been used for the purpose the law intended it to effect, and without an ulterior unlawful purpose in view, it can not be said to have been abused, yet if it is so used maliciously and without an honest and reasonable belief of a right to so use it, the person against whom it has been employed, if damaged thereby, may have his action to recover such damages, if the process ought not in fact have been made use of. The action in such case is not for an abuse of the process but for a malicious and wrongful use of it, and recovery is allowed only with an exception hereafter noticed, when it is made to appear by the proof that the use of it, though legal in form and procedure, was in fact wrongful, and that the defendant did not employ it in the honest and reasonable belief that it was just for him to do so, but was actuated and moved by malice in its use.

The exception referred to is that if the property of a defendant be seized by the wrongful use of process and such property damaged or injured by the act of seizure or by a custodian having charge of it under the process, recovery

may be had in the absence of malice or without regard to the motives that actuated the person at whose instance the process was used.

In such cases, however, the recovery is limited to such special injury and damage to the property. Nothing of the kind is claimed here.

There is no evidence in this case tending to show that the execution was perverted to a use not designed by law to be effected by such writs or that it was employed for any purpose other than that of legally subjecting the lands to sale. So far as the use made of the execution was concerned there was no abuse of the process, and if not abused its use was lawful unless the appellants were actuated by malice and without reasonable grounds to believe that they might lawfully employ it as they did. Testimony produced in behalf of the appellants and facts and circumstances appearing in the evidence tended to disprove malice and to prove that the appellants in good faith actually believed that they were proceeding lawfully in the course taken by them. It was proven that they acted upon the advice and instruction of an attorney at law and a member of the bar of the State, engaged in the actual practice of the profession, to whom the material facts were fully made known.

Whether they acted in good faith and upon reasonable grounds for such faith and belief, were important and material elements for the consideration of the jury, upon which the right of the plaintiff to recover rested.

It is urged that the debt had been paid when the appellants caused the judgment to be entered; that the appellant had full knowledge of such payment; that with such knowledge there was not and could not have been any reasonable ground or cause for entering the judgment or issuing the execution; that malice is presumed in the absence of reasonable or probable cause and that therefore the acts of the appellants in entering the judgment and causing the execution to issue was a willful and malicious and unjustifiable use of the power and process of the court; that therefore upon the admitted and uncontested facts the judgment is

right and ought not to be disturbed. This contention all rests upon the assumption that the debt had been paid and the appellants having knowledge of such payment, proceeded to take judgment. It can not, in correctness of speech, be said that the note was paid, but rather that the legal effect of the conveyance was to relieve the appellee from a liability to pay it. It was discharged by operation of the rules of law and not paid in the ordinary meaning of the word. Appellant did not admit nor understand that such was the legal effect of the conveyance of the mortgaged premises to appellant Lehman, but supposed that the appellant company would be required to account for the property at its value as a credit upon the note and that such value would be determined by the court upon a hearing.

They were advised by counsel upon full disclosure of all the facts that such hearing and adjustment by the court might be lawfully brought about by the course pursued by them. They are not to be judged by the actual state of the case in law or in fact, but upon their honest and reasonable belief as to the facts and the legal effect thereof. 2 Greenleaf, Evid., Sec. 455; *Anderson v. Friend*, 85 Illinois, 135.

If they in good faith relied and acted upon such legal advice, we know of no reason why they should incur liability beyond that incurred by every suitor who institutes a groundless action and every defendant who endeavors to maintain a groundless defense. In every contested suit at law the result makes it manifest either that the plaintiff has employed the function, powers and process of the court in the prosecution of a groundless claim, or that the defendant has used such functions, powers and process in furtherance of his desire and effort to substantiate and maintain a groundless defense.

Payment of legal costs is the measure of the liability in either case, unless malice and want of reasonable or probable cause may, under the peculiar circumstances of some particular case, create an exception. The jury should have been so instructed in the case under consideration.

The judgment must be and is reversed and the cause remanded.

**City of Charleston v. Commissioners of Highways of the
Town of Charleston.**

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1. **HIGHWAY TAX—*Erroneously Paid Over by the Collector—Action for.***—An action will not lie in favor of a city, the territory of which is wholly within a township, against the commissioners of highways of the township, to recover one-half of the tax required to be levied by sections 13 and 14, CH. 121, R. S., and collected for road and bridge purposes on the property lying within an incorporated village, town or city in which the streets and alleys are under the care of the corporation, erroneously paid over by the collector to the treasurer of the highway commissioners.

Memorandum.—Assumpsit. Error to the Circuit Court of Coles County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The statement of facts is contained in the opinion of the court.

F. K. DUNN and J. W. CRAIG, attorneys for plaintiff in error.

A. J. FRYER, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant brought assumpsit against the appellee to recover one-half of the road and bridge tax collected within the city limits.

The declaration averred that the territory of the city is wholly within the town, and that the commissioners of highways have annually levied a tax upon all property in the town, including the city, and the tax so levied has been extended, collected and paid over to the treasurer of the commissioners of highways.

The Circuit Court sustained a demurrer to the declaration, and plaintiff not desiring to amend, judgment was rendered for defendant.

By Secs. 13 and 14 of Ch. 121, entitled "Roads and

Bridges," the board of highway commissioners are authorized to levy taxes for road and bridge purposes upon property within the town.

It is provided by section 16 that "one-half of the tax required to be levied in sections 13 and 14, and collected for road and bridge purposes on the property lying within an incorporated village, town or city in which the streets and alleys are under the care of the corporation, shall be paid over to the treasurer of such village, town or city."

The money is collected by the town collector and it is his duty to pay one-half of it to the city treasurer, but as is here alleged, he paid it all to the treasurer of the highway commissioners.

Will an action lie in favor of the city against the commissioners?

We had occasion to consider a similar question in the *Town of Rushville v. The President and Trustees of the Town, etc.*, 39 Ill. App. 503, and reached the conclusion that the plaintiff could not recover.

We think that the views there expressed are applicable here and that the ruling of the Circuit Court should be sustained. Judgment affirmed.

Job P. Marshall v. Nelson Freeman.

1. CHECKS—*Loss by Delay in Presenting*.—As between the drawer and the holder of a check, the law is that, although the drawer has suffered some loss, less than the amount of the check, by the *laches* of the holder in respect to the time of its presentment, there may be a recovery of the difference between the amount of such loss and that of the check. The drawer is discharged only *pro tanto*.

2. REMITTITUR—*Excess of Amount Due*.—Where the finding of a jury is in excess of the amount due, the entry of a *remititur* cures the error.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The statement of facts is contained in the opinion of the court.

Marshall v. Freeman.

APPELLANT'S BRIEF, GRAY & WAGGONER, ATTORNEYS.

It is the duty of the holder of a check to present it during banking hours of the next day after he receives it. If this is not done, and a loss is occasioned by the subsequent insolvency of the drawee, the drawer is discharged. McDonald v. Mosher, 23 Ill. App. 211; Proctor v. Einstein, 20 Ill. App. 664; Marine & Fire Ins. Co. v. Tincher, 30 Ill. 403; 17 Am. State Rep. 807, note.

APPELLEE'S BRIEF, KINSEY THOMAS, ATTORNEY.

A check is always supposed to be drawn on a previous deposit of funds. Heartt v. Rhodes, 66 Ill. 356; Bailey et al. v. Partridge et al., 134 Ill. 188; 2 Morse on Banks and Banking, Sec. 544; Everett v. Collins, 2 Camp. 515; Porter v. Talcott, 1 Cow. 359.

The drawing of a check without funds to meet it is a fraud. Heartt v. Rhodes, 66 Ill. 351; 2 Parsons on Contracts, 623.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellee brought this action of assumpsit on a check of which the following is a copy:

“VERMONT, ILL., June 8, 1892.

J. Mershon & Co., Bankers:

Pay to N. Freeman or bearer five hundred ninety-four
75-100 dollars.

J. P. MARSHALL,
D.”

The declaration contained also the common counts, including one on an account stated. The pleas were the general issue and payment. Trial by jury and verdict for plaintiff for \$594.75; motion by defendant for new trial; *remittitur* by plaintiff of \$267.64, being forty-five per cent of the amount assessed; motion overruled and judgment for residue, \$327.11 and costs.

The facts confessedly shown are as follows: Besides the business of farming carried on by appellant near Vermont, he had a flouring mill at that place, which was operated for

him by Mr. Darrah, who was authorized to draw checks in his name on mill account, to be indicated by the word "mill," or by his own name or its initial letter appended to the signature. This was understood by J. Mershon & Co., the bankers. By special arrangement with them, the mill account was kept in the bank in the name of "J. P. Marshall—mill," entirely separate and distinct from his general account.

The check in question was given by Darrah for wheat bought of appellee, and delivered by him for the mill. On receiving it he took it to the bank, but finding the doors being closed for the day, did not present it. He went home, about four miles from the town, and did not return nor take any step to collect the check until the 18th, ten days afterward.

On the 15th the bank suspended payment, and on the next day made an assignment for the benefit of its creditors. Appellee has received nothing for or on account of the check. When it was given to him the mill account had been overdrawn \$713.60, and so remained. There was, however, a balance to the credit of the other at that time, and continuously until the assignment, sufficient to pay the check in full.

Appellant filed and proved his claim, under the assignment, without regard to the check, and there was some evidence tending to show that the assets would pay from fifty to sixty per cent of the liabilities, which was not contradicted.

We see nothing in the record which would modify the legal effect of the facts, thus stated upon the judgment below. The question is argued, upon these facts and some other testimony, whether there was any money in the bank subject to the checks, but its decision is deemed unimportant. If appellant was liable at all, he was so, either for the amount of the check or for the proportion that the assets of the bank bore to its liabilities; in other words, to the extent to which he was not damnified by appellee's neglect, if he did neglect, to present the check in apt time. All that the

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decision of the question stated could determine, would be the extent of the liability, if any there was, which is already settled, and at the lowest amount, by the *remittitur*. Appellant can ask no more as to that than is thus conceded by the appellee. But it leaves untouched the question of his liability, which remains to be determined by the undisputed facts and evidence above mentioned.

Notwithstanding the learned and ingenious argument of counsel we think he is liable, upon principles of law so familiar as to require no citation of authority.

Through his agent he bought and received appellee's wheat and gave him this check for the price. That it was chargeable to a mill account, kept separate from another, by his arrangement with the bankers, can not be material. Both accounts and all their credits and debits were his, and the obligation to pay this debt was upon him alone, directly and personally.

The giving of his check for its amount did not discharge that obligation. Appellee did not agree that it should. He received it as a means of payment, to be made effectual by its presentment in proper time. That was a matter of interest to himself and of duty to appellant, if he had funds in the bank to meet it. Whatever loss of those funds, not exceeding the amount of the check, that appellant would otherwise sustain through his disregard of that duty, would fall upon him; but no more.

If the evidence left it doubtful, the *remittitur* is a concession by appellee that appellant had funds in the bank to meet it; that appellee failed in his duty as to its presentment, and that by reason of such failure appellant sustained a loss of those funds to the extent of forty-five per cent, but no more.

With this concession as to the extent of his loss, appellant is not satisfied. The evidence in relation to it is the judgment or opinion of one of the assignees that the assets of the bank will pay from fifty to sixty per cent of its liabilities, including that to appellant, which, as filed by and allowed to him, embraces what he intended by this check to transfer to appellee.

The nature of the case admitted of no better evidence on this point. The amount that would be realized was necessarily matter of opinion. We are not prepared to hold that appellee can have no right of action until the assets are all converted into money and the exact percentage is thus ascertained. There are assets. Something will certainly be realized from them. Payment to appellant of his proportion is fully secured. In such case no opinion that can now be formed as to its amount would be exactly what will be shown, but any that would be entitled to respect would be as likely to prove favorable to the one party as to the other. Impossibilities are not required of anybody.

Appellant having filed as part of his claim the money intended to be transferred to appellee, is in no position to claim that appellee should have filed it for himself.

The refusal of instructions 8, 9, 10, 10½, 11, 12 and 13 asked by defendant, was justified by the same error in each, namely, that to be entitled to recover in the case therein respectively stated, the plaintiff must show that the defendant sustained no loss by the neglect to present the check for payment in proper time. As between the drawer and holder of a check, we understand the law to be that although the drawer has suffered some loss, less than the amount of the check, by the *laches* of the holder in respect to the time of its presentment, there may be a recovery of the difference between the amount of such loss and that of the check. The drawer is discharged only *pro tanto*. *Howes v. Austin*, 35 Ill. 396. Upon the entry of the *remittitur* the motion for a new trial was properly overruled, and upon the conceded facts, the judgment was just. For the reasons thus stated it will be affirmed.

City of Beardstown v. Lou Smith.

1. MUNICIPAL CORPORATIONS—*Duty as to Streets and Sidewalks.*—The law requires a municipal corporation to use ordinary care to keep its streets and sidewalks in a reasonably safe condition. But a person who travels over them has no right to walk recklessly into danger.

City of Beardstown v. Smith.

2. **ERROR—What Can Not be Assigned.**—A party can not assign for error an error in an instruction which he has, himself, induced the court to commit. substantially, in another instruction.

3. **OBJECTION TO EVIDENCE—When Abandoned.**—Where an objection to a question was erroneously overruled, but the question in substance being repeated, no objection was made, and the witness was cross-examined upon the same subject, *it was held* that the objection was abandoned.

4. **EXPERT TESTIMONY—Impeachment.**—Where a physician was shown to be competent to testify as an expert, being a graduate in medicine and in active practice for fifteen years, *it was held* that evidence that he had been sued for malpractice and adjudged guilty and that his professional standing was not good, had no tendency to impeach his veracity or his memory.

5. **EXAMINATION OF A PARTY—Court's Power to Order.**—A court has no power to make or enforce an order that the plaintiff submit to an examination of his person by a physician.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cass County; the Hon. LYMAN LACEY, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The statement of facts is contained in the opinion of the court.

MILLS & McCLURE, attorneys for appellant.

BAILY & HOLLY, and HENRY PHILLIPS, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Adams street, in Beardstown, runs north of west and south of east and is crossed at right angles by Fifth. There was no artificial crossing of the latter on the east side of the former, nor sidewalk on either of the blocks next north and south, but a beaten and continuous path along both and across Fifth was commonly used as such by foot-passengers. The city cut a short ditch beginning on the south side of Fifth and along it, and ending at a catch basin over an underground sewer on Adams, to conduct the surface water. Its dimensions are variously stated by witnesses having dif-

ferent means of judgment. The evidence tends to show it was about eighteen inches in depth at the basin, running back with an upward incline some five feet to the surface, a little over two feet in width, floored and walled up on both sides with rock, the top course of which was hammered square, and left uncovered. It was cut directly across the foot path and at that point was about fourteen inches in depth. Both the path and ditch were there somewhat obscured by weeds.

Between half past eight and nine o'clock in the night of September 25, 1891, appellee, returning along the path by the direct route to her residence, stepped into this ditch and fell; and for the injury and damage alleged to have been thereby sustained, recovered in this action a judgment below on a verdict for \$2,250.

Appellant sought a new trial there and asks for a reversal here on the grounds, among others, that whatever injury she sustained by the fall is due to her own failure to use ordinary care for her safety and not to any negligence of appellant; that the fall was the proximate cause of only a small part of the pain, sickness and disability she has since suffered, and the damages awarded her are grossly excessive.

Ordinarily, where the proof seems to us insufficient to support the finding, we feel it due, at least to the appellant or defendant in error, to discuss it fully enough to show the reasons for our conclusion. But where it appears to have fairly made a question for the jury, such a discussion, as a rule, is of little interest and less advantage to anybody. Having considered the evidence upon these issues in this case, and being satisfied that upon each it did so present such a question, we shall not refer to it further than may be necessary in noticing the other errors assigned.

Of these the first is the refusal of the following instruction: "If the jury find from the evidence that the plaintiff was guilty of any negligence, however slight, which contributed to the alleged injury complained of, then the jury must find their verdict for the defendant, unless the jury further find from the evidence that the defendant was guilty of negligence, which in comparison with plaintiff's, was gross."

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If from this the jury should understand, as they well might, that "any negligence, however slight," included a degree which might still consist with ordinary care, they would be materially misled as to the law; and if they would understand by it a degree of negligence greater, however slightly, than would consist with ordinary care, the instruction asked was worse than useless to the defendant who asked it, being less favorable to it than were those asked and given for the plaintiff—all of which were to the effect that in that case the plaintiff would not be entitled to recover for any degree of mere negligence on the part of the defendant, however gross, comparatively or absolutely, which is clearly the law. And that is just the dilemma which must confront every instruction that attempts to invoke the rule of comparative negligence, as it is claimed the Supreme Court introduced and for a long time maintained it. Counsel cite no case in defense of this instruction later than that of the *Town of Grayville v. Whitaker*, 85 Ill. 439. We do not see how it can be defended against the reasoning and judgment in *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512, and the cases following it. We think the instruction was rightly refused.

Two others asked were refused, which we do not copy, because of their length, and because counsel themselves describe them as "instructions which in substance directed the jury that municipal authorities are vested by the law with a certain discretionary power in deciding where street crossings shall be put in, and that unless such discretion is shown to have been abused, municipalities are not liable for damages resulting wholly from the absence of such crossings." These were inapplicable and misleading. By implication they assumed that the negligence complained of was the neglect to put in an artificial crossing at Fifth street on the east side of Adams. Neither of the four counts contained any such complaint. Each charged the wrong to be that the city spoiled a safe crossing made by use, by cutting this ditch through it and neglecting to cover or guard it, or properly light it at night; and all the evidence offered went to sustain the charge so made.

In several instructions for plaintiff touching the duty of the city in the premises, "streets" were put in the same category with "sidewalks and crossings;" and it is said, upon the authority of *City of Aurora v. Hilman*, 90 Ill. 61, and the *City of Lacon v. Page*, 48 Ill. 499, that they do not belong there, and that as the city had not constructed a crossing at the place where plaintiff fell, and there was evidence tending to prove it was not "generally" used as such, these instructions were improper. There was a cinder crossing on Fifth street on the west side of Adams, and it may well be that it was more generally used than the path in question, but there is no contradiction of the proof that there was a plain, beaten path over the east side of Adams which was quite commonly used as a crossing. The public, so far as appears, did not complain of the want of an artificial crossing there, and the city did not complain of the use of the path for that purpose. It would have been entirely safe if let alone, and being known to be so used, the city was bound to take reasonable or ordinary care not to change it from a safe to a dangerous condition. We think that for all the purposes of this case it was a crossing; and since the allegation and proof were confined to it, the instruction as to "streets" if erroneous, could not have done any harm. Besides, several of the instructions for defendant are to the same effect. The language of the fifth is that "while the law requires a municipal corporation to keep its streets and sidewalks in a reasonably safe condition, yet a person who travels over the streets or sidewalks has no right, recklessly, to walk into danger." And that of the fourth is "that the defects in the streets or sidewalks of a city, to make the corporation liable, must be of such a nature," etc. So of the eighth. A party can not assign for error an error in an instruction which he has himself induced the court to commit, substantially, in another. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 366-7; *Northern Line Packet Co. v. Bininger*, 70 Ill. 575.

If, as above said, the "path" may properly be regarded as a crossing, it disposes of the objection to the seventh instruction for plaintiff.

City of Beardstown v. Smith.

On her direct examination she was asked: "What were you receiving for your work while you worked?" and answered: "I received fifty cents a day while I was working for the Misses Hinton. I had made arrangements to go into business in Roodhouse for myself, by which I could have made \$2.50 per day for my work." This last statement was objected to, and the court was asked to rule it out, but refused, and exception was taken. The next question was: "You may state what you could have earned if it had not been for this accident;" and answered: "I could have earned \$2.50 per day," to which no objection was made. To the next question, "Have you been able to earn anything since?" she answered, "No, sir."

The record of her cross-examination is as follows: "Tell this jury how you were going to earn this \$2.50 a day? A. By dress-making. Q. Did you ever earn \$2.50 a day at dress-making? A. Yes, sir. Q. Where at? A. In Roodhouse. Q. How much did you get when you worked by the day? A. Fifty cents. Q. You say you earned more at Roodhouse? A. Yes, sir. Q. Why did you come down to work for fifty cents? A. That was because I was called home at the time my sister got married. Q. And you continued to work for fifty cents a day when you could make \$2.50 a day? A. Yes, sir. I was not ready to go into business for myself."

The special damages claimed in the declaration covered only the hindrance to her business and expenses incurred to be cured. What she would have made by the special arrangement referred to in her statement was, therefore, not properly admissible under the pleadings, nor was her estimate or opinion of what she would or could have so earned. It should have been ruled out on the objection made. *City of Chicago v. O'Brennan*, 65 Ill. 160. But it was "necessary to inquire into the ability and capability to labor or carry on business prior to the injury, for it is manifest that what would be compensation would be greatly in excess of what another should recover, and inadequate to compensate still another," as was said by the

Supreme Court in *City of Joliet v. Conway*, 119 Ill. 492. To show her "ability and capability to labor and carry on business," in order to ascertain what would be a fair compensation for its prevention, is to show the reasonable value of her labor in such business. When it is of a kind that is paid for in wages, the usual amount per day, week or month is easily ascertainable as a fact; but in other cases it is matter of opinion, and therefore opinion is as competent evidence in such cases as is knowledge in the others. This statement objected to was not responsive to the question, and also was incompetent, not because it was an opinion as to what she could have made, but because it was what she could have made by special arrangement to go into business for herself, the loss of which would be special damage, not alleged in the declaration. But the next question was without reference to any special arrangement, How much could you have earned if it had not been for the accident? and the answer was the same — \$2.50 per day. No objection was made to this question or answer. Counsel accepted it and cross-examined upon it as general and competent, without any inquiry as to the special arrangement, what it was, whether partnership or not, how much capital it required and how much she had, or anything else in relation to it. This may be considered as an abandonment of the objection, since the statement complained of was the same as the answer which was received without objection, and could do no more harm. Nor do we think that the jury could have been influenced by either. The fact she stated was that she worked by the day and got fifty cents for it, while her opinion was that if she had gone into business for herself, with the necessary capital and ability to conduct it, without any experience, she could have made out of that capital, labor and ability as much as \$2.50 per day; but she was called home by the marriage of her sister, and was not ready to go into business for herself, whether because of her injury, or for want of the necessary capital, or for what other reason, if any, does not appear. It is not to be presumed that such an opinion, of a party to the suit, in her own interest, could

have had any weight with the jury as against the fact that in her actual business she received only fifty cents a day.

Dr. Lang treated appellee professionally, and testified on her behalf to some facts he claimed to have observed, and upon some other points as an expert. Appellant offered to prove by him, that he had been sued for malpractice, and adjudged guilty; and also, by Dr. King, that his professional standing was not very good; all of which, on objection made, the court excluded.

That he was competent to testify as an expert, was established by proof that he was a graduate in medicine, and had actively pursued its practice for fifteen years. The evidence offered would have had no tendency to impeach his veracity or his memory, and we know of no rule under which the mere weight of an expert's testimony can be affected, one way or the other, by proof of his general reputation for skill or judgment, or knowledge in his art or profession. That can be done only by dealing directly with the particular opinions and statements in question.

The court was asked to order the plaintiff to submit to an examination by a physician, under proper restrictions, but refused. This ruling was proper. "The court had no power to make or enforce such an order." *Parker v. Enslow*, 102 Ill. 279; *C. & E. I. R. R. Co. v. Holland*, 18 App. 422-3.

Lastly, it is urged that the verdict should have been set aside, for alleged misconduct of a juror, in associating with the plaintiff during the progress of the trial. The alleged association consisted in his walking with her on one occasion, a part of the way, being a short distance—from the court house to their common boarding place. Unexplained, this might have been regarded as a serious matter. The affidavits filed in support of, and opposition to the motion, fully disclose the circumstances, and in our opinion relieve it of all suspicion of wrong in its purpose, or injury in its effect. It would be useless to go into the details.

Seeing no material error in the record, the judgment will be affirmed.

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Frank X. Schattgen v. Adolph Holnback.

1. **MALICIOUS PROSECUTION**—*Malice and Want of Probable Cause a Question for the Jury.*—In actions for malicious prosecution the fact of the existence of malice, and the want of probable cause, are questions for the jury to determine from the evidence.

2. **IMPEACHMENT OF WITNESSES**—*Proper Form of Examination.*—The proper examination on this subject has been reduced to a formula, well known to experienced lawyers. First, do you know (not state if you know) the general reputation of the party in respect to the particular quality or conduct in question; and then, in case of an affirmative answer, what is that reputation, good or bad.

3. **CRIMINAL PROSECUTION**—*Sufficiency of the Complaint.*—A complaint in a prosecution for a criminal offense, which states the offense in the language of the statute, is sufficient.

Memorandum.—Malicious prosecution. Error to the Circuit Court of Jersey County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1898, and affirmed. Opinion filed October 28, 1898.

The opinion states the case.

BRIEF FOR PLAINTIFF IN ERROR, J. S. CARR AND H. W. POGUE.
ATTORNEYS.

The policy of the law is rather to encourage the prosecution of criminals alleged to be guilty of grave offenses; but if the prosecuting witness is to be mulcted in damages for an honest error in judgment, few prudent men would run the hazard of instituting a criminal prosecution. It is sufficient if there is probable cause, whether the accused is in fact guilty or not. *Ames v. Snider*, 69 Ill. 377.

BRIEF FOR DEFENDANT IN ERROR, T. F. FERNS AND O. B. HAMILTON, ATTORNEYS.

“The rule for granting a new trial on the ground of excessive damages in actions for malicious prosecution is well settled. To justify the exercise of this power the damages must be flagrant, outrageous and extravagant, evincing intemperance, passion, partiality, or corruption on the part of

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the jury." Newell on Malicious Prosecution, p. 545, Sec. 38; Walker v. Martin, 43 Ill. 508; Chapman v. Cawrey, 50 Ill. 512; Montross v. Bradsby, 68 Ill. 185; Hirsch v. Feeney, 83 Ill. 548; Roy v. Goings, 112 Ill. 656.

Where a defendant demurs to a declaration, and after his demurrer is overruled, pleads over, he will be precluded from insisting upon a motion in arrest of judgment for insufficiency of the declaration. Quincy Coal Co. v. Hood, Adm'r, 77 Ill. 68; Independent Order of M. A. v. Paine, 23 App. 171; S. C., 122 Ill. 625; School Directors v. Kimmel, 31 App. 537; Chicago & E. I. R. R. Co. v. Hines, 132 Ill. 161; Shreffler v. Nadelhoffer, 133 Ill. 536; Ambler v. Whipple, 139 Ill. 311.

An action for malicious prosecution will lie for instituting a criminal prosecution on a complaint which does not show an offense committed. Newell on Malicious Prosecution, page 29, § 21, (2), § 22, (1) (2); 2 Greenleaf on Evidence, § 449, (13th Ed.); Bishop on Non Contract Law, § 228; 14 Am. and Eng. Enc. of Law, page 58, notes (2) (3); Shaul v. Brown, 28 Iowa, 37; 4 Am. Rep. 151; Dennis v. Ryan, 65 N. Y. 385; 22 Am. Rep. 635.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Action on the case for malicious prosecution. Verdict for plaintiff for \$1,050. New trial and arrest of judgment refused, and judgment entered on the verdict. Defendant prosecutes this writ of error.

The parties were butchers, kept rival meat shops in Jerseyville for many years and were not on friendly terms.

The declaration contained two counts; one on a complaint against plaintiff by defendant before a justice of the peace under section 7 of the criminal code, for selling diseased meat, which was dismissed by the state's attorney, and the other on an information in the County Court, upon affidavit of the defendant, charging plaintiff and George Holnback with unlawfully selling, offering for sale and keeping for sale the flesh of a diseased steer, upon which the defendants

therein were tried by jury and acquitted. A demurrer, general and special, to the whole declaration and to each count thereof, was sustained as to the first, but overruled as to the other. To the plea first filed to the second count a demurrer was also sustained, whereupon the defendant got leave and filed the general issue, upon which the trial was had.

Defendant contested the allegations of malice and the want of probable cause, set up by way of defense; that he had fully and fairly stated to counsel the facts and evidence on which he proceeded and followed their advice and direction in respect to the prosecution, and attempted to impeach the character of plaintiff as a butcher.

These were all questions of fact, upon each of which we think there was evidence clearly sufficient to support the verdict. Unless there was some error on the part of the court, materially contributing to produce that result, it should be held conclusive.

Error was assigned upon the giving and refusal of instructions but was not urged in argument here. Counsel simply say that the two refused instructions asked for the defendant should have been given. They are in effect the same, and their substance was fairly given both in the first for defendant, and sixth for plaintiff.

Those insisted on, relate to the exclusion and admission of evidence offered as to the plaintiff's character and to the ruling on the motion in arrest of judgment.

If it was allowable, under the authority of *Israel v. Brooks*, 23 Ill. 575, either in mitigation of damages or as "good ground for augmenting a suspicion against him," to prove specific acts of plaintiff in violation of the statute, other than that for which he had been prosecuted, we apprehend the proof must be such as would be competent in a prosecution directly for such act. Therefore the statement of the witness Milem, that Emeline Decker had told him plaintiff bought of Mr. Fall, a cow or steer that was crippled, which was the nearest approach to any such act alluded to in all the testimony, was not evidence. Hearsay is not competent; nor was the purchase of a crippled food-animal, had it been properly proved, necessarily within the statute.

The only other way of impeaching plaintiff's character that we know of was to prove that his general reputation in the neighborhood where he did business, with reference to offenses substantially like or of the same character with the one in question, was bad.

That section of the statute which defines this offense embraces others also. They all relate to substances intended for food, or to candy or other confection. This offense is defined or described as follows: "Whoever * * * shall sell or offer to sell or keeps for sale any flesh of any diseased animal * * * shall be confined," etc. In the others, which are the adulteration of those substances for the purpose of sale, or the selling, offering or keeping for sale such adulterations, and all of which precede this, the *scienter*, in terms, is clearly included as an essential element. If not in this also, we hold it to be clearly implied. This was admitted by the information here in question by the allegation that the act charged was "unlawfully" committed, as well as "contrary to the form of the statute," etc.

A very large proportion of the questions of defendant as to plaintiff's reputation were excluded, and a like proportion of the answers to such as were not, were stricken out. These questions called for "his reputation," without regard to its extent; or for his reputation or general reputation "as a butcher," without indicating for what—skill, promptness, fairness, or selling diseased meat; or for selling "diseased or *bad* meat;" or "as to the character of stock he killed for sale," without specification or limitation as to that character; or for "*buying* or selling diseased *animals*," without regard to the purpose or *scienter*, or to the buying or selling of the flesh of the animals as distinguished from the animal. Food animals, like others, are subject to diseases that are curable, and a butcher may lawfully buy to cure, or sell to be cured. The buying, selling or slaughtering of diseased animals is not unlawful and may be commendable. What the statute denounces, is the selling, or offering, or keeping for sale, and to be used as food, the flesh of animals diseased when slaughtered. The diseased steer may lawfully be bought or sold for its hide, or the hog for its grease.

The proper examination on this subject has been reduced to a formula well known to experienced lawyers. First, do you know (not state if you know) the general reputation of the party in respect to the particular quality or conduct in question; and then, in case of an affirmative answer, what is that reputation—good or bad? In this case the formula seems to have been avoided with what almost seems like studied pertinacity, and we think the court properly disallowed the questions.

Of the examples presented by counsel in the abstract and brief for plaintiff in error, pp. 83-7, which are all that are presented, there is but one that is not objectionable for one or another of the reasons here indicated, and that one was not objected to. But the answer to the second question—was it good or bad?—was, "I have heard rumors to that effect;" which the court properly ordered to be stricken out. Upon further examination that witness (McReynolds) was asked, "What effect? Is that reputation good or bad?" And answered, "Well, I would not consider it first-class." On cross-examination he said: "I don't know that I can tell a person from whom I heard it. What was said was more of his selling a poor quality of meat. It pertained more to that; it was the character of the beef killed generally." Both of these answers are in the record, and together were about all that was shown as to his reputation for selling "diseased" meat. The other witnesses said it was for selling "bad meat"—evidently referring to its quality as poor, tough or the like, but not meaning that it was flesh of a diseased animal. Such testimony was properly stricken out.

Against the little impeaching evidence introduced, the plaintiff rebutting, called quite a number of prominent citizens of Jerseyville who had known him for many years and never heard a word unfavorable to his reputation in the respect in question. On this point plaintiff in error has no substantial ground for complaint of the court or jury.

It is said that neither the affidavit nor the information based upon it set forth any offense, and hence there was no case of which the County Court could take jurisdiction; that

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upon that information there could be no valid prosecution, malicious or other, and therefore the count upon those proceedings set forth no legal cause of action. Upon that proposition it is claimed that the motion in arrest of judgment should have been sustained.

The language employed in the affidavit and information to describe the supposed offense, is precisely that used for the same purpose in the statute, except that the act there described is alleged to have been committed "unlawfully"—which certainly does not impair its legal effect; and the same code declares that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statutes creating the offense." R. S., Ch. 38, Div. 11, Sec. 6. Nothing more can be required of an information by the state's attorney.

Without conceding the insufficiency of the information, we observe that the defendant is precluded from insisting on a motion in arrest, because he first demurred, and after it was overruled, pleaded the general issue. This rule is well settled. *Quincy Coal Co. v. Hood*, 77 Ill. 68; *I. O. of M. A. v. Paine*, 122 Ill. 625; *C. & I. R. Co. v. Hines*, 132 Ill. 161 (overruling the *dictum* in *Stevens v. Cope* in 109 Ill. 346); *Schreffler v. Nadelhoffer*, 133 Ill. 536.

There was evidence strongly tending to show actual malice in the criminal prosecution on the part of the plaintiff in error, and the actual damage shown was sufficient, in view of that fact, to warrant the amount assessed. Judgment affirmed.

Hiram Bowsher et al. v. Marilla A. Porter, Administratrix.

1. **PROMISSORY NOTES—Payments, Receipts, etc.**—In an action upon a promissory note by an administratrix, the defendant produced a receipt dated March 30, 1881, in which it was stated that the deceased had received a sum of money of him to be credited on a note held against

him for \$250. The date of the note was not given. The receipt did not describe the note in suit, and therefore it was incumbent upon the defense to show the note sued on was intended.

Memorandum.—Assumpsit on a promissory note. Appeal from the Circuit Court of De Witt County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The statement of facts is contained in the opinion of the court.

R. A. LEMON, attorney for appellants.

S. K. CARTER, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Appellee, as administratrix of John A. Porter, deceased, brought suit in assumpsit upon a promissory note dated January 1, 1876, for \$260, payable to the deceased and signed by Hiram Bowsher and John M. Porter. The issues were submitted to the court, a jury being waived. The finding was for the plaintiff and judgment followed, from which the present appeal is prosecuted.

The sole question is whether the note is subject to a credit of \$350.

The defendants produced a receipt dated March 30, 1881, in which it was stated that the deceased had received that sum of money of said Hiram Bowsher to be credited on a note held against him for \$250. The date of the note was not given.

The defendant attempted to show that it was intended to pay and credit this money on the note in suit.

The receipt did not describe this note and therefore it was incumbent upon the defense to show this note was intended.

We have carefully read the evidence as it appears in the record, and we are entirely satisfied with the conclusion reached by the trial court.

It is not deemed necessary to state the evidence in detail or to notice the arguments of counsel upon the various

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points which they have thought proper to discuss. Were the evidence less satisfactory than it is, we should be unable, under the well settled rules, to reverse the finding. The judgment is affirmed.

Joseph H. Thompson v. Silas Alkire.

1. **VENDOR AND VENDEE—*Belief no Reason for Non-performance.***—The mere fact that the vendor was induced to believe the vendee would not perform his part of the contract is no reason for non-performance by the vendor.

2. **VENDOR AND VENDEE—*Equitable Estoppel.***—Where a vendee has so acted as to induce a belief in the mind of a reasonable person that the contract would be broken, and the vendor changes his position upon the strength of such belief, a court of equity upon a bill for specific performance by the vendee might bar the desired relief, and possibly in a court of law there might be a defense on the ground of estoppel.

Memorandum.—Action on a contract to convey real estate. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

E. WINTER and E. R. E. KIMBROUGH, attorneys for appellant.

CALHOUN, STEELY & JONES, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment against appellant for \$250 damages for failing to convey real estate in pursuance of a contract in writing.

As stated in the brief of appellant the principal contention on the evidence is as to the value of the land on March 1, 1892.

Upon this point the evidence was conflicting, but there is no reason for our interference. There is abundant proof to sustain the verdict, and there is nothing to induce the belief that the jury failed to give proper weight to any of the testimony.

It was their province to reconcile the evidence if possible, and if not, to determine as best they could what was the fair value of the land.

It is not at all probable that another jury could reach a more accurate conclusion.

It is objected that the court refused to permit defendant to prove that the land contained ninety-two acres for the purpose of showing that the tender was insufficient.

The written contract describes the land as containing eighty acres, more or less—and according to plaintiff's testimony, not denied by defendant, at the time of the trade the defendant told him the tract contained eighty-seven and one-half acres. The tender was made on the basis of ninety acres, the real quantity being unknown, and was not objected to because insufficient in amount.

We think the court properly excluded the offered proof.

It is urged that by the fourth instruction given for plaintiff the jury were advised to add up the estimates given by the different witnesses and divide the gross sum by the number of witnesses. The instruction does not bear such construction and it is not to be presumed the jury so understood it.

It is also urged as error that the court refused the following instruction:

"The court instructs you, that if one party to an executory contract induces the other to believe, by his acts and proceedings subsequent to the execution of the contract, that he does not intend to perform the contract, the other party has a right to consider the contract at an end; and in this case, if the jury believe, from the evidence, that the plaintiff in this case, by his acts and proceedings, so induced the defendant to believe that he, plaintiff, did not intend to perform his part of the contract, then, and in that case, he can not recover in this case."

The mere fact that the vendor was induced to believe the vendee would not perform, was no reason for non-performance by the vendor. Had the vendee so acted as to induce a belief in the mind of a reasonable person that the contract would

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be broken, and had the vendor changed his position upon the strength of such belief, so reasonably induced, another question would arise, and in a court of equity upon a bill for specific performance by the vendee, such a state of facts might bar the desired relief, and possibly in a court of law there might be a defense on the ground of estoppel. This we need not determine. The hypothesis of the instruction was clearly insufficient, and the court properly refused it. We find no substantial error and the judgment will be affirmed.

Nathaniel N. Winslow v. Grant Covert.

1. EVIDENCE—*In Chief and upon Rebuttal.*—Where a witness upon his cross-examination explicitly denies certain matters, he can not be again called upon to testify to the same matters in rebuttal.

Memorandum.—Assumpsit. Appeal from the County Court of McLean County; the Hon. C. D. MYERS, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The statement of facts is contained in the opinion of the court.

KERRICK, LUCAS & SPENCER, attorneys for appellant.

N. W. BRANDICAN and LILLARD & WILLIAMS, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$50.03 for wages.

The defense was that the employment was for a specific term, and that, without sufficient excuse, the plaintiff quit work before the expiration of the term. The plaintiff denied that the contract was for a definite period, but insisted that even if it was, the defendant, by failing to comply with the conditions binding upon him, released the plaintiff from work. ing the whole time.

The case turned upon the questions of fact thus presented.

There was such conflict in the evidence as is often seen in cases of this sort and the jury were compelled to settle it as best they could. We are impressed with the belief that the solution reached is probably the true one—but whether so or not, it must be so regarded, for in view of the evidence as it appears in the record we can not interfere.

The objections now urged as to the ruling of the court in admitting and rejecting evidence seem to be without merit. It does not appear that anything important and relevant was excluded, or that anything important and irrelevant was admitted. We do not care to consider and discuss all the items in detail. We have carefully examined them all and find no error of consequence therein. Perhaps the matter most deserving of notice, is in respect to the examination of the defendant when he was recalled to rebut the evidence of the three witnesses who were on the jury in the trial before the justice of the peace.

The court refused to allow him to answer the questions put to him and was justified in so doing by the fact that, on his cross-examination when previously testifying, he had gone quite fully over the whole ground and had explicitly denied the matters which those jurors were called to prove. Hence, there was no occasion for him to testify again to the same matters. His statement thereon was already before the jury. A repetition was neither necessary nor proper.

We have carefully read his testimony from the record and are satisfied his rights were not prejudiced by this action of the court.

As to the instructions the appellant makes some complaint, but we think without sufficient cause. When the whole series is read and considered it will be seen that the attention of the jury was fairly called to the real issues and that the rules of law applicable were stated with sufficient clearness and accuracy.

The jury were not misled by the rulings or instructions of the court, and as it is to be presumed that they fairly weighed the testimony, their conclusion will not be disturbed. The judgment is affirmed.

Illinois Central Railroad Company v. Robert H. Murphy.

1. **NEGLIGENCE**—*Speed of Trains in Incorporated Towns.*—It is negligence in a railroad company to run its trains into a station in an incorporated city at a speed in excess of that fixed by the ordinances of that city.

2. **INSTRUCTIONS**—*Rules of Railroad Companies.*—It is error for the court to leave it to a jury to say whether the rules of a railroad company are applicable to a certain train. The application of such rules is a matter of construction for the court.

Memorandum.—Action for injuries. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

Plaintiff's instruction assigned for error:

The jury are instructed that you are to determine from all the facts and circumstances in evidence in this case, whether or not the special order given plaintiff by defendant, suspended, abrogated, or superseded the general rules of the company; but in no case would the rule requiring of the plaintiff the exercise of due care be suspended or abrogated.

WOLFE & STOKER, attorneys for appellant.

GERE & PHILBRICK, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff below recovered a judgment against the defendant below on account of injuries sustained by the plaintiff while engaged in the capacity of an engineer on defendant's road.

The plaintiff was pulling a special freight train, having a special time table, and ran into a construction train. Conceding that the men in charge of the construction train were not fellow-servants of the plaintiff, and that they were negligent in not having given more notice than was proved of their presence on the track, the vital question of fact was whether the plaintiff had exercised due care, and if not,

whether this contributed so materially to the result that it should bar a recovery.

The plaintiff's train was going north and the construction train was in a curve just north of the limits of Cobden station. The latter train was not visible, because of the curve, until just before the collision.

It appears that the plaintiff ran into the station at the rate of twenty-five miles per hour; that the rate fixed by the village ordinance was ten miles per hour, and that this rate of speed was so noted on the regular time card with which the plaintiff was familiar. It also appears that the plaintiff had been notified about thirty days before to look out for this construction train. At that time it was working about five miles north of Cobden. There was a general notice on the bulletin boards to look out for such trains. Clearly the plaintiff was at fault in running into the station at a speed in excess of that fixed by the ordinance. This was negligence of a very decided character, and it is difficult to see how it did not contribute materially to the result. As he neared the station some one attempted to signal him by holding up something in the hands, and a moment later waived a flag. The person doing this was probably connected with the construction train, though it is not very certain from the proof. At any rate the plaintiff was unable to stop after he got the signal. It was shown that the following rules were printed in the regular time table and were then in force:

"Rule 10. All trains when approaching stations, watering places or coaling places must do so with great care, expecting to find some train occupying the main track. Conductors of freight trains will be on top of cars and must see that their brakemen are in the proper place to immediately apply the brakes to slow or stop the train if necessary to do so. Also before commencing and while descending long grades. This rule is not intended to excuse employes from exhibiting the proper signals, as provided in rules 7, 9, 11 and 12, but as an extra precaution to prevent accident.

Rule 18. All extra and irregular trains running by tele-

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graph orders must be run with great care. A long whistle for four (4) seconds must be sounded one-half mile from abrupt curves as a warning to trackmen."

There was a long descending grade extending a mile and a quarter south of the station, and when starting down this grade the plaintiff says he shut off steam, but did nothing else to reduce his speed, with the result that he ran into the station and through at the rate of twenty-five miles per hour. He whistled at the whistling post a quarter of a mile south of the station, but he did not give the signal required by rule 18 when approaching an abrupt curve. It is hardly doubtful that a compliance with these rules by the plaintiff would have averted the collision.

The court left it to the jury to say whether these rules were applicable to the plaintiff's train. This, we think, was error. It was a matter of construction for the court and the jury should have been instructed that the rules were applicable. *I. C. R. R. Co. v. Neer*, 31 App. 126. It is not desirable that employes of railroad companies should be encouraged in disregarding rules reasonable as these, and so necessary for the safety of the employes as well as of the property of the company. The safety of passengers is also involved in the enforcing of such regulations. Sound public policy requires a due observance of all those precautions, which experience has shown are indispensable in the operation of railroads, and we are not disposed to sanction laxity in this respect.

The judgment will be reversed and the cause remanded.

Frank M. Palmer v. City of Clinton.

1. **HIGHWAYS—Dedication and Acceptance.**—A person platted an addition to a town in which a strip of land was included in certain lots, and afterward executed a written instrument, which was duly recorded, whereby he designated a strip, being fifty feet in width off the east side of said first named strip, as a public street. Afterward the municipal authorities caused a survey of the city, it having been organ-

ized as such, and its additions to be made, in which this strip appeared as a street, and was reported to the council. Afterward by an act amending the city charter the General Assembly declared that this survey, upon being spread on the county records, should be the only legal and correct survey of the city. *It was held* that these acts amounted to an acceptance of the street by the public.

Memorandum.—Suit for the violation of an ordinance obstructing a street. Appeal from the Circuit Court of De Witt County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

WM. MONSON, attorney for appellant.

MICHAEL DONAHUE, city attorney, for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant was fined for obstructing a street. The principal contention now made in his behalf is that the *locus in quo* was not a street.

It is not doubtful that the original proprietor intended to dedicate the parcel or strip to the public use as a street.

Having first platted an addition to the town (now city) in which the strip was included in lots 3 and 6 of block 1, he afterward executed a written instrument which was duly recorded, whereby he designated the strip, being fifty feet in width off the east side of said lots, as a public street. Afterward the municipal authorities caused a survey of the city and its additions to be made. This survey, in which this strip appears as a street, was reported to the council January 30, 1868. By an act approved March 29, 1869, amending the city charter, the General Assembly declared that this survey, upon being spread on the county records, should be the only legal and correct survey of the city of Clinton. It was filed for record April 16, 1869. Here, then, is the highest evidence of acceptance. There was also some proof of work done on the street by the city. The judgment is right and will be affirmed.

The Girard Coal Company v. Charles H. Wiggins.**Same v. John C. Cloyd.****Same v. James Sinnott.****Same v. James McKnight.**

52	69
91	238
52	69
100	*547
52	69
110	*487

1. **MINES AND MINING—Duty of the Owners of Mines.**—It is the duty of the owners and operators of mines to provide "safe means," etc., for carrying persons in and out of the mines.

2. **MINES AND MINING—Willful Violation of the Mining Law.**—Sec. 14 of Ch. 98, entitled "Miners," declares the liability when the owner or operator of a mine "willfully" fails to provide such "safe means" or machinery. A willful violation of the statute is a violation of its provisions knowingly and deliberately.

3. **WILLFUL NEGLIGENCE—What Constitutes.**—To constitute willful negligence, the act done or omitted must have been intended. Negligence so gross in character as to amount to recklessness, and to indicate a willingness to subject others to a known and avoidable risk, will support a charge of willful or intentional wrong.

4. **CARE—Failure to Use Ordinary.**—The failure to use ordinary care does not necessarily include the elements of willfulness. A charge of willfulness is not maintained by proof of mere negligence.

5. **MINES AND MINING—Test of the Owner's Liability.**—The test demanded by law as to the machinery, is that it shall be safe, but the test of the liability of the mine owner is that he willfully failed to make or keep it safe.

6. **MINES AND MINING—Duty of Owners in Providing Machinery.**—The law does not require mine owners to use any particular make of machinery, nor does it require them to use the very best and most modern kinds; it only requires that the machinery shall be reasonably safe and suitable for the purposes for which it is used.

7. **INJURIES—Defense When the Act is Willful.**—When recovery is sought for injuries resulting from mere inadvertence or negligence, pure and simple, the defendant may often defeat liability upon the ground that the plaintiff knew of the dangers to which he might be exposed and voluntarily chose to take the chances of encountering them; or upon the other ground, that the plaintiff was injured by the negligence of a fellow-servant; but neither of these defenses is available when the injury is the result of the willful act, or willful failure of the defendant to act.

8. **EXPERT TESTIMONY—What is Not.**—A witness, though not learned in the science of medicine, may express an opinion as to whether another is insane, sober, ill, or suffering with pain.

9. EVIDENCE—*Hypothetical Questions*.—The proper purpose of a hypothetical question is to obtain the opinion of one entitled by superior learning and experience to speak and express an opinion upon a state of facts which, for the purpose of his consideration, are to be received by him as true.

10. INJURIES—*The Result of Incompetent Employees*.—If a master, in employing an engineer, had knowledge at the time of his employment, or at any time before an injury occurs, that he was incompetent or inexperienced, and has willfully employed or kept him in his employment after obtaining such knowledge, the company will be liable.

Memorandum.—Action for personal injuries. In the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendants. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

APPELLANT'S BRIEF, CONNOLLY & MATHER, ATTORNEYS.

The master does not have to furnish absolutely safe machinery, nor the best or most improved kind. Weber Waggon Co. v. Peter Kehl, 139 Ill. 646.

APPELLEE'S BRIEF, PATTON & HAMILTON, ORENDORFF & PATTON AND STALEY & GUARD, ATTORNEYS.

The question of willfulness must be determined by the jury from the facts and circumstances of each particular case. It is as difficult of definition as negligence itself. It is such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness. When the statute requires the owners or operators of mines "to provide safe means of hoisting and lowering persons" in their shafts, and they knowingly fail in any particular to so provide, or when the defects are such that, by the exercise of reasonable care, they might have known of them, they are guilty of willfulness, and one injured because of such failure may recover, and the doctrines of contributory negligence and the negligence of fellow-servants have no application. L. S. & M. S. Ry. Co.

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v. Bodemer, 139 Ill. 596; Catlett v. Young, 38 Ill. App. 193
Niantic Coal & Mining Co. v. Leonard, 126 Ill. 216.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF
THE COURT.

The Girard Coal Company, the appellant in each of the foregoing cases, was operating a coal mine at Chatham, Illinois, by means of a shaft, into which it lowered its employes in iron cages, which were hoisted and lowered by a steam engine and other appliances provided by it for the purpose. On the 16th day of January, 1892, one of its cages, in which the appellees in the cases named, all being employes of the appellant company, were being lowered into the mine, fell with great force and violence to the bottom of the shaft. All of the appellees were injured by the fall, and each brought an action on the case in the Sangamon Circuit Court, to recover damages by them thus respectively sustained.

The cases were tried before the court and a jury, the result in each instance being a judgment against the appellant company. From these judgments the company brought each of the cases into this court by appeal. The facts of each case as to the manner and cause of the fall of the cage are the same, and counsel very properly, by agreement, presented all the cases in one brief, made applicable to them all. The ground of recovery in each case is, that the appellant company willfully violated Sec. 6 of Chap. 93 of R. S., as amended by the act of the General Assembly in force July 1, 1887, by providing for the use of the mine in hoisting and lowering the cages, an unsafe and unsuitable steam engine, and defective, worn and insufficient appliances used in connection therewith; and that it violated Sec. 7 of the same chapter of the statutes by placing such steam engine and appliances in charge of an incompetent, inexperienced and intemperate engineer; and that the fall of the cage and the consequent injury to the appellees was the result of such willful violations and omissions of statutory duty. The plea of the appellant company was "not guilty." It is formally

assigned for errors that the damages allowed in each case were excessive, but the point was not mentioned in the oral argument, nor referred to in the printed briefs, and is therefore deemed waived or abandoned. We, moreover, do not think it well taken in any one of the cases.

Exceptions were taken to certain rulings of the court upon questions of the admissibility of evidence, in the course of the different trials, to which we will refer in the further course of this opinion, though no error demanding a reversal thus occurred. The chief contention of the appellant company is, that the verdict in each case is against the weight of the evidence. We were favored by counsel with an exhaustive oral discussion of the evidence and points involved in the cases, which we followed with careful attention, and we have attentively read, and fully considered the printed briefs and argument of counsel, which are largely devoted to questions of the sufficiency of the testimony.

After a thorough examination of the somewhat voluminous testimony, and full consideration of the argument of counsel as to the force and efficacy thereof, we have arrived at the conclusion that sufficient evidence was submitted in each case to warrant the findings that the engine and other parts of the machinery brought into requisition in hoisting and lowering the cage, were so defective as to be unsafe, and that the engineer in charge was incompetent and inexperienced, and further, that the appellant company, through its chief officials, was sufficiently advised of the unsafe condition of the machinery, and of the fact that the engineer was not competent and had not had sufficient experience as an engineer to justify his retention in that position, and that having such knowledge, the appellant company deliberately continued to use the engine and machinery, and to keep the engineer in charge and control of it. When we find it necessary to set aside the verdict of a jury, and reverse the action of a court in approving it, because in our view the evidence is insufficient to support the verdict and judgment, we feel that in proper consideration of the rights and interests of the parties whose litigation we

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reopen, as well as due regard for the opinion of the trial court and jury, demands that we enter into a discussion of the testimony appearing in the record, and point out wherein it fails to justify the rendition of the judgment. When, however, we find the testimony sufficient to warrant and support the verdict and judgment, no such reasons require that we lengthen the opinion by a recapitulation and an analysis of the testimony, or that we should state at length our reasoning as to the weight and value of the facts and circumstances proven, or our conclusion in detail upon the different controverted questions of fact; nor can we see that any benefit would accrue to the litigants or to the profession, however elaborate in that respect the opinion might be.

We content ourselves, therefore, with the statement that we find sufficient evidence in the record to uphold the several judgments, and that it can not be said that the findings of the jury were in any of the cases manifestly wrong. Unless prejudicial error is found in the rulings of the court as to the admissibility of evidence, or in the instructions given to the jury, the judgments should not be disturbed.

It is objected that certain instructions given in each case in effect advise the jury that the engine and machinery, in order to exonerate the appellant company from liability, must be safe, while the law, as appellant's counsel insist, only requires that the engine and appliances shall be reasonably safe. The court instructed the jury upon behalf of the appellant that the statute only required that the appellants should provide reasonably safe engine and machinery, and the instructions given for the appellees, which are supposed to announce a contrary rule, will be found to do so only because of the incorporation of the words of the statute into the instructions.

The language of the statute is that "the owner or operator of every coal mine operated by shaft shall provide safe means of hoisting or lowering persons in a cage, etc. (Sec. 6, Chap. 93, R. S., entitled Mines.) We are not prepared to say that this statute should be construed to require only reasonably safe machinery. The operation of transporting persons to

and from the bottom of mining shafts in cages moved and controlled by steam power is attended with great danger. This statute was enacted in view of such danger, and it should have such construction as will effectuate the purposes designed to be accomplished, which was the safety of persons thus carried in the cages. The dangers to which such persons are exposed are even greater than that of persons who are being transported by railroad companies in coaches and cars propelled upon tracks upon the surface of the earth by steam engines, for the cages are subject to perils arising from the action of the laws of gravitation, from which railroad cars and coaches are in comparison measurably free. Yet the law demands of railroad companies the highest degree of care and skill, to the end that their machinery connected with the propulsion and control of passenger coaches shall be safe. If we were left to formulate a rule we should regard the duties and responsibilities of railroad companies as carriers of passengers and that of mine owners as carriers of persons in cages into and out of their mines as so far analogous, that no distinction favorable to the mine owner could be drawn between the degree of care, diligence and skill that ought to be required. But we think the statute itself furnishes the rule that it is to govern as to mine owners. While the sections we have mentioned require that the owners and operators of the mine shall provide "safe means," etc., for carrying persons into and out of the mines, the 14th section of the same act only declares liability when the owner or operator of the mine "willfully" fails to provide such "safe means" or machinery. A willful violation of the statute has been defined to be a violation of its provision knowingly and deliberately (*Cattlet v. Young*, 143 Ill. 74), and in the *Peoria Bridge Co. v. Loomis*, 20 Ill. 235, it was ruled that "to constitute willful negligence the act done or omitted must have been intended." Negligence so gross in character as to amount to recklessness and to indicate a willingness to subject others to a known and avoidable risk, may support a charge of willful or intentional wrong, but the failure to use ordinary care does not necessarily include

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the elements of willfulness. A charge of willfulness is not maintained by proof of mere negligence. C., B. & Q. R. R. Co. v. Dickson, 88 Ill. 431; 18 Amer. & Eng. R. R. Cases, 192; see Shearman & Redfield on Negligence, Sec. 7. Therefore we think the test demanded by the law as to the machinery is that it shall be safe, but that the test of the liability of the mine owner is, that he willfully failed to make or keep it safe. The instructions do not depart from the words of the statute and are not in this respect complained of, objectionable.

In the Wiggins case, and in fact in each of the cases, the court, in behalf of the plaintiff, gave the following instructions:

“The court instructs the jury that a person or corporation operating a coal mine is bound to avail himself or itself of all new inventions and improvements known to him or it which will contribute materially to the safety of employes, whenever the utility of such improvements has been thoroughly tested and demonstrated and their adoption is within the power of such person or corporation, so as to be reasonably practicable.”

And in behalf of the defendant in each case the following instruction:

“The law does not require mine owners to use any particular make of engine or machinery, nor does it require them to use the very best and most modern engine or machinery; it only requires that the engine and machinery shall be reasonably safe and suitable for the purpose for which it is used.”

The appellant company objects to the first of these instructions. However the rule may be, it can not be contended that the instruction could have been so prejudicial to the appellant as to demand a reversal. It was not proven or attempted to be proven in either of the cases that any such “new inventions or improvements” had been made and was known to the appellant company, nor did the right of recovery in either case hinge at all upon the existence of such “new inventions” or more improved machinery. The instruction might well have been refused upon the ground

that there was no evidence to base it upon, but no harm came from it we feel assured.

In the Wiggins case, further complaint is made that the court erred in giving the first, third and fourth instructions in behalf of the appellee. As to the first, the complaint is that the jury are not told that before the plaintiff could recover, it was necessary that it be proven not only that the engineer was incompetent or inexperienced, or the machinery not safe, but further, that the injury complained of must have resulted therefrom. The instruction purports only to advise the jury as to what would constitute a willful violation of the statute and it was not therefore necessary that it should direct them as to all the elements of a right of recovery. The third instruction directs the jury as to the duty of the appellant company in relation to its engineer, and the objection made against it is that it does not sufficiently state that the company is liable only for willful delinquencies in that respect. As to this the instruction in effect is that if the engineer was incompetent or inexperienced, and the appellant company had knowledge thereof, or could have had such knowledge "by the exercise of reasonable diligence," then the retention of the engineer should be deemed a willful omission of duty. There is force in the objection.

We do not understand, as we have here before stated, that the mere failure to exercise ordinary care and diligence is sufficient to create liability under and by force of the statute. The delinquency or violation must have been willful—not merely an "inadvertence" or failure to use ordinary care. Hence we can not approve the instructions, but yet do not think the cases should be reversed because of the error therein. First, because we find it quite satisfactorily proven by a preponderance of the evidence that the appellant company had knowledge of the defects in the machinery and of the incompetency of the engineer and with such knowledge, deliberately continued to use the machinery and to commit it to the control of the engineer. Hence the verdict was right upon the facts proven and ought not to be

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disturbed. Second, because the appellant company of its own accord submitted the case to the jury, upon the same theory as to the degree of care and diligence required of it as that declared in the instruction now objected to. *Con. Coal Co. v. Haenni*, 146 Ill. 614. But one instruction asked of the trial court by the appellant company in the Wiggins case was refused, and it related to alleged improper remarks of counsel for the appellee in the presence of the jury.

It is not complained that any instruction presented by the appellant in that case was in any manner modified. It is then to be assumed that the instructions given in appellant's behalf stated the law as the appellant desired it should be understood by the jury. The appellant asked for and obtained this instruction.

The first count charges that the defendant in violation of the statute willfully employed "Edward Cahill, who was then and there an incompetent, inexperienced and intemperate engineer." To entitle the plaintiff to recover under this count, he must prove by a preponderance of the evidence that the engineer was either inexperienced or incompetent at that kind of work, or that he was intemperate, and that the defendant knew that when it employed him, or ascertained it after he was employed and before the accident, or that the defendant, by the use of reasonable care, could have discovered the inexperience, incompetency or intemperance of such engineer before the accident.

At least two other instructions, the same in effect as the one quoted, were asked for by the appellant company and given by the court, and none to the contrary. The statute as thus declared to the jury by the appellant's instructions when considered as a series, only required the appellant company to use ordinary care to provide reasonably safe machinery, and a like degree of care to secure a competent and experienced and sober engineer; but made it liable for omissions and violations of the statutory provisions in these respects occurring through a lack of reasonable care and diligence, though not willful.

While we do not understand the construction thus given

the statute to be correct in either respect, yet such was the construction given at the request of the appellant company. Its counsel no doubt regarded the defense the stronger under such view of the law and ought not to be allowed now to complain, unless the court can see that the verdict was wrong upon the merits of the controversy.

It is urged that the judgment in the Wiggins case should be reversed because of alleged erroneous ruling of the court upon questions of the admissibility of evidence. Edward Cahill, the engineer, a witness for the appellee Wiggins, upon cross-examination, when asked if the co-operative company (of which it was alleged Wiggins was a member) had recommended him as a competent and experienced engineer to Mr. Young, who was in charge of appellant's mine, replied that "Mr. Young told him such recommendation had been made." This was withdrawn by the court on motion of the plaintiff below, and such action of the court is assigned for error. The ruling was correct. No reason is known and none is suggested, why the appellant should be permitted to give in evidence the declarations of one of its officers.

Further, Mr. Young, as a witness for the appellant company, was allowed to testify fully as to such alleged recommendations of Cahill as an engineer, by the members and officials of the co-operative company, so no possible wrong could have occurred.

William Bates was allowed to give in evidence his opinion as to the effect of certain alleged defects in the engine and machinery upon the power of the engineer to control the cages, and as to whether or not the use of an "indicator" in connection with the hoisting machinery contributed to the safety of the operation of lowering the cages. Error in this respect is alleged to have occurred. The evidence showed that Bates was, and for four years had been engaged in the business of erecting hoisting machinery in coal mines; that he had been superintendent and assistant superintendent of the mines of the appellant company at Girard, and mine manager of the Chatham Coal Company's mines, and that he had been constantly engaged as hoisting engineer

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for a period of five years. He was, we think, competent to express an opinion as an expert and was properly permitted to do so by the court.

The court refused to allow Mr. Young, appellant's mine manager, to testify as to orders and instructions given by him concerning the iron covers of the cage.

The second count of appellee's declaration charged that the appellant company violated the statute by failing to provide "covers of boiler iron" for its cages, but the appellee closed his case without submitting any proof relative to such charge or in any manner relying upon it. It was therefore entirely unnecessary to consume the time of the court in hearing evidence as to the covers of the cage. At the request of the appellant the court instructed the jury that "there is no evidence tending to show that the injury occurred because the cages were not so covered, and that as to such charge the plaintiff could not recover, and that you need not spend any time considering the question as to how the cage was covered."

Appellant's complaint in this respect, is entirely groundless. No other objections are presented in the Wiggins case.

We find no substantial error in the instructions or ruling of the court in that case, and believing that the evidence amply supports the verdict, the judgment is affirmed.

In the Cloyd case the jury was instructed, at the request of each of the parties, practically to the same effect as was the jury in the Wiggins case. Therefore what has heretofore been said as to the instruction in the latter case is fully applicable to the objections urged against the instructions given in the Cloyd case.

Mr. Matthews, as witness for the appellant in the Cloyd case, when testifying as to the competency of the engineer and the manner in which he controlled and managed the cages, mentioned an incident or occurrence which he would not say occurred while Cahill was acting as engineer. The court, on motion of the appellee, Cloyd, excluded the testimony as to such incident or occurrence. This is assigned for error. We are not able to perceive the applicability or

force of the evidence. Counsel did not refer to it in the oral argument and in the printed brief and argument only say "we thought it competent and believe it was error in the court to exclude it." Perceiving no reason in favor of its admission and none being suggested, we can only overrule the objection.

It is complained that the court refused to allow J. H. Darneille, a witness for the appellant company in the Cloyd case to answer whether Cahill (the engineer) said to him "that he could run that engine twenty years and not have an accident." The statements of Cahill in no way bound Cloyd, and were inadmissible in evidence, except for the purpose of impeaching Cahill. No foundation for such impeachment had been laid and therefore the statement of Cahill was properly excluded.

So we find no error in the Cloyd case demanding the reversal of the judgment. It is therefore affirmed.

In the Sinnott case the instructions asked and given in behalf of each of the parties with but one exception announce as the correct rule that the statute requires that mine owners shall provide "safe means of hoisting and lowering persons in cages," and shall place the engine and machinery used for that purpose in charge of a competent and experienced engineer, and be liable for willful violations of, or willful failures to observe such requirements. The rule thus announced accords with our views as expressed hereinbefore when passing upon instructions in the Wiggins case.

The exceptional instruction is one given for the appellant, which may be construed to require no higher degree of care and diligence in a mine owner in providing machinery than merely ordinary care, but of this the appellant company does not complain, because it is in its favor, and ought not to be allowed to complain, because it asked for and obtained the instruction as it was given. The court modified three instructions asked by the appellant in this, the Sinnott case. The first as modified and given was as follows:

"No verdict can be found against the defendant in this

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case unless it is proven by a preponderance of the evidence that the defendant *wilfully violated* the statutes by employing an inexperienced or incompetent engineer, and that the injury occurred because of that, or that the defendant *wilfully* used insufficient machinery, and that the injury occurred because of such insufficient machinery."

The instruction as presented to the court instead of using the word "wilfully," italicized in the instruction above quoted, attempted to employ other words supposed to be equivalent in meaning, amounting to a definition of the word. This the court struck out and instead inserted the word "wilfully." The definition of the word wilful was not and could hardly have been properly interpolated in the instruction. Therefore the court adopted the statutory word.

The modification of the second of these instructions did not serve at all to change in any degree the legal rule sought to be announced, but only to restrict its application to the issue made under the charge in the declaration, that the appellant company wilfully employed an incompetent and inexperienced engineer. The modification added to the clearness and force of the instruction and detracted nothing from its proper effect.

The third modified instruction when presented to the court, announced, to entitle the plaintiff to recover upon the ground that the engineer was incompetent or inexperienced, it must be proven that such engineer was so incompetent or inexperienced and that the appellant had knowledge thereof, and with such knowledge wilfully employed him. The court so modified the instruction that it allowed recovery if the appellant knew when it employed him or *at any time prior to the injury to the appellee* that the engineer was incompetent or inexperienced, and wilfully employed or kept him in its employment after obtaining such knowledge.

The propriety and correctness of the modification can not, it seems to us, be doubted.

The court refused two instructions asked by the appellant company in the Sinnott case. The first of these instructed the jury that Sinnott could not recover if he

knew before the injury, or by reasonable diligence might have known, that the engineer was incompetent or inexperienced, or the machinery or engine defective, and the second declared that Sinnott could not recover if he and the engineer were fellow-servants. Neither of these instructions ought to have been given. When recovery is sought for injuries resulting from mere inadvertence or neglect, pure and simple, the defendant may often defeat liability upon the ground that the plaintiff knew of the dangers to which he might be exposed and voluntarily chose to take the chances of encountering them, or upon the other ground that the plaintiff was injured by the negligence of a fellow-servant; but neither of these defenses are available when the injury was the result of the willful act, or willful failure to act, of the defendant.

We have examined and considered the contention of the appellant that errors occurred in the ruling of the court upon questions of the admissibility of evidence in the Sinnott case, but find no errors in that respect requiring a reversal of the judgment.

Finding no such error in the Sinnott case as to demand a reversal and that the evidence is sufficient to warrant the verdict the judgment rendered upon such verdict is affirmed.

In the McKnight case it is urged that the court erred in admitting certain evidence in behalf of the appellee. One specific objection is that Henderson, a witness for McKnight, was allowed to testify that McKnight "seemed to be in pain when attempting to plow; that he acted and looked as though he was in pain." We understand that any witness, though not learned in the science of medicine, may express an opinion as to whether another is insane, sober, ill or suffering with pain.

Again it is insisted that the court erred in allowing Dr. J. L. Taylor to express an opinion as to the character of McKnight's injuries, whether likely to be permanent or not, in answer to a hypothetical question which was based to some extent upon statements assumed to have been made by

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McKnight to his physician, while under medical treatment for his injuries, and which statements the witness was, in considering the hypothetical question, directed to consider as being true. The objection seems to be that it was error to allow the physician to express an opinion based upon the assumption that the statements of the plaintiff made to his physician as to the seat and character of his pains were true. There can be no force in this. The proper purpose of a hypothetical question is to obtain the opinion of one entitled by superior learning and experience to speak and express an opinion upon a state of facts which, for the purpose of his consideration, are to be received by him as true.

The complaints of a patient and his statements made to his physician as to his pains and symptoms may, under certain circumstances, be properly proven, and it is not complained that in this case evidence of that character which was given was improperly received. A hypothetical question might, therefore, be properly submitted upon the assumption that the hypothetical facts were true.

The objections to the instructions in the McKnight case do not present for consideration any point not considered in the other cases. It is therefore unnecessary to refer to them.

We find no errors in the case of sufficient gravity to require us to disturb the verdict and judgment.

The judgment in the McKnight case, as in each of the other cases, must therefore be affirmed.

County of McDonough v. G. W. Pace et al.

1. **PAUPERS.**—*Necessaries Furnished by Private Persons.*—A county is liable for necessaries furnished a pauper upon the order of a supervisor.

Memorandum.—*Assumpsit.* Error to the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

STATEMENT OF THE CASE.

This case was presented to the court, a jury being waived, upon the following agreed state of facts, viz.: That prior to March 19, 1890, the defendant county furnished partial support to its poor and indigent persons resident within said county; that on said 19th day of March, 1890, the board of supervisors of said county passed the following resolution: "Resolved that each township pay all partial support granted its inmates;" that on the 21st day of March, 1890, the board of supervisors directed the county clerk of said county to draw an order upon the treasurer of said county for \$8,000 of the money in the hands of said treasurer, levied and collected for the support of paupers and poor and indigent persons in said county, and that said money be distributed between the various towns of said county in proportion to the amount of taxes levied in each town; that under said resolution there was placed in the hands of the supervisors of the city of Macomb in said county, the sum of \$788.75; that said supervisors of said city of Macomb expended all of said money in the partial support of paupers and poor and indigent persons, prior to the first day of March, 1892; that since the said money was placed in the hands of said supervisors under such order of distribution, the county board of said county has refused to and has not paid any money or claims for the partial support of poor and indigent persons; that since the first day of March, 1892, the plaintiffs furnished provisions and groceries to one Louisa Pestle, a poor and indigent person residing in the city of Macomb, in said county; that said provisions and groceries were furnished upon the order of John W. Cook, one of the supervisors of said city; that plaintiffs presented a bill for said goods, duly verified by affidavit, to the board of supervisors of said county, and that said board of supervisors refused to pay the same, the appeal in this cause being from the order of said board in refusing to pay said bill; that the provisions and groceries furnished by the plaintiffs were necessary for the support of said Louisa Pestle, and were reasonably worth the sum of \$3.04; that prior to the first

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day of March, 1892, and at and prior to the time said provisions and groceries were furnished, the county board of said county had provided, and there was in said county, a poor-house, under the control of said county board, where the paupers of said county were supported, and that paupers of said county were supported at said poor-house by said county; that paupers were and are received at said poor-house when taken by supervisors of said county, and upon the order of any of said supervisors.

The court found the issues for the plaintiff, and rendered judgment accordingly for the amount of the plaintiff's account, \$3.04, to reverse which the county has prosecuted its writ of error.

NEECE & SON, attorneys for plaintiff in error.

BRIEF OF DEFENDANTS IN ERROR, BAILY & HOLLY AND AGNEW
& VOSE, ATTORNEYS.

It is the duty of the county to furnish necessary support to all poor and indigent persons who are not supported by their relatives or at the county poor-house. R. S., Chap. 107, Sec. 20, 23; County of Perry v. City of Du Quoin, 99 Ill. 479.

The contracts of a supervisor within the scope of his statutory powers and in the absence of fraud, binds the county. Board of Sups. of Clay Co. v. Plant, 42 Ill. 325.

The county can not escape liability by refusing or neglecting to make any rules or regulations on the subject, or by making unreasonable rules and regulations. County of Perry v. City of Du Quoin, 99 Ill. 479.

Plaintiff in error can not complain in this court that the Circuit Court erred as to the law applicable to the case, for the reason that no propositions of law were submitted to the Circuit Court. R. S., Chap. 110, Sec. 42; Hobbs v. Ferguson, 100 Ill. 232; N. W. Ben. and M. A. Assn. v. Hall, 118 Ill. 169.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

We are of opinion the judgment of the Circuit Court is correct. The nature and extent of the liability of the

county in respect to the support of paupers were quite fully discussed in *The County of Perry v. The City of Du Quoin*, 99 Ill. 479.

It is unnecessary to repeat or enlarge upon what was there said. The principles announced cover this case and sufficiently support the judgment, which will be affirmed.

William Mellor et al. v. Wm. Carithers et al.

1. EVIDENCE—*Declaration of an Agent*.—It is never admissible to show an agency by the declarations of the supposed agent. When the agency is not in dispute the declaration of an agent in regard to a transaction then pending *et dum fervet opus* will bind the principal. This is because it is a verbal act and a part of the *res gestæ*.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Fulton County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed November 27, 1898.

The statement of facts is contained in the opinion of the court.

Plaintiff's sixth instruction, assigned for error:

If you believe from a preponderance of the evidence in this case, that prior to the time of the giving of the certificate of deposit introduced in evidence in this case—if you find from the evidence that the same was given to the plaintiffs by the firm of J. Mershon & Co.—the defendants, William Mellor, Martin Lawyer, E. K. Leighty, Edward Hamer, Samuel Schroder, Samuel Chipman and John Kost, knowingly so conducted themselves in connection with the business carried on at Vermont, Ill., in the firm name of J. Mershon & Co., as to reasonably justify the public and persons generally dealing with said firm, in supposing and believing that they were members of said firm, and that the plaintiffs, at and before the receiving of said certificate of deposit, had been informed that defendants were interested as partners in said firm of J. Mershon & Co., and at the time they took and received such certificate of deposit they (the plaintiffs) reasonably supposed and believed that said defendants were partners in said firm and acted on that supposition, then the said defendants would be liable on said certificate whether they were in fact such partners or not.

52	86
55	662
52	86
63	581
52	86
74	456

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J. A. MCKENZIE and KINSEY THOMAS, attorneys for appellants.

GRAY & WAGGONER, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of appellees against appellants and several other parties as members of the banking firm of J. Mershon & Co. upon a certificate of deposit and a draft which was dishonored. The appealing defendants denied that they were members of said firm at the time the liabilities were incurred, and the principal question in the case was whether they had so held themselves out as that they were estopped to deny the partnership with respect to the plaintiffs' demand. As to the draft it is conceded that the appellants are liable, but they insisted below and now insist that at the time the certificate of deposit was issued they were in no wise responsible for the transactions of J. Mershon & Co.

For a number of years a banking business had been conducted by several of the heirs of Jacob Mershon, deceased, under the style of J. Mershon & Co., at Vermont, in Fulton county. For reasons not specially stated, it was deemed best to strengthen the firm by the admission of a number of additional partners, and a paper was drawn up for that purpose. The paper bore date April 28, 1892, but was not then signed by all the parties, and not by some of them until the 6th of June, when the parties all met and the new firm was in fact organized. This paper, which was in effect an agreement to form a partnership wherein each partner was to put in a specified amount of capital, was quite lengthy in its provisions and need not be set out at this time. As we understand it is not seriously contended as a matter of law that as between the contracting parties a partnership actually existed on the 6th of May, when the certificate of deposit was issued, but that the parties had so conducted themselves that they should not be permitted to deny the partnership. As to one of the appellants, Samuel Chipman, the case seems to us quite unsatisfactory.

While his name was not finally signed to the articles of partnership until the 6th or 7th of June, yet it was generally understood that he was to be one of the new firm. He was apparently undecided whether to go in or not, and on the 29th of April he distinctly told the plaintiff that he had not signed and did not intend to do so. Yet a circular had then been issued announcing the new firm with his name as one of the members. He denies that he authorized this publication.

We shall not state even in a general way the evidence pertaining to the question whether Chipman and the other appellants are affected by the rule of estoppel.

As between Chipman and the plaintiff it was to say the least a very close question whether he ought to be regarded as a partner at the time the certificate of deposit was issued. The plaintiff, notwithstanding Chipman's disclaimer on the 29th of April, made the deposit on the 6th of May.

Against the objection of defendants the court permitted plaintiff to testify to what Durell, the cashier, said at that time, which was in effect that he understood Chipman and several others named were partners. This ruling is assigned as error.

It is defended on the ground that Durell was then the agent of defendants, and that what he said in the transaction of the business of receiving the money and issuing the certificate was a part of the *res gestae*, and as such admissible.

The fallacy here is in assuming that he was the agent of defendants. He was not, unless they were then members of the firm. But Chipman, at least, was not a member of the firm at that time, and the only ground upon which he can be held is, that he is estopped to deny it.

This declaration of Durell was offered for the very purpose of establishing the point in dispute, that is, as to the partnership.

It is never admissible to show an agency by the declarations of the supposed agent, and in effect that was what was done here.

Mellor v. Carithers.

The argument of appellee begs the question. When the agency is not in dispute, the declaration of an agent in regard to a transaction then depending, *et dum fervet opus*, will bind the principal. This because it is a verbal act and so part of the *res gestæ*.

It would be a perversion of the rule to admit such declaration when the important question before the jury involved the agency of the declarant, and here we are bound to say, as a matter of law, upon the undisputed facts, that he was not an agent of Chipman, for the reason that at that time Chipman was not a member of the firm.

The same observation may be made as to the other defendants who had not then signed the articles of copartnership.

It is not necessary to determine, whether, as between themselves, any of the signers were bound until all had signed. For the present purpose, that question need not now be discussed. We think it was error of a substantial character to admit this declaration of Durell.

The sixth instruction for plaintiff was erroneous, as we think, because, by the concluding and effective part of it, the jury were advised, that if plaintiff was *informed* that defendants were partners, and reasonably supposed, and believed, that the defendants were partners, then they would be liable. The first clause of the instruction was predicated upon alleged acts of defendants in holding themselves out as partners, but as though by design, the concluding portion was not made to depend upon such acts of defendants, but upon information received by plaintiff, not necessarily based upon or referring to such acts. When this instruction, as thus drawn, was considered in connection with the evidence of Durell's declaration, it is quite probable the jury were misled.

Durell's declaration contained all the *information* necessary to establish liability in the light of this instruction.

For the errors indicated we feel constrained to reverse the judgment and remand the cause for another trial. Reversed and remanded.

W. O. Peake v. Anderson Walton.

1. **DECEIT**—*False Representations as to Quality of Land Sold.*—An action for deceit will lie for falsely and fraudulently representing the quantity of a tract of land and thereby deceitfully inducing a person to buy the same.

2. **VARIANCE**—*Between Proof and Declaration May be Waived.*—A variance between the allegation of the declaration and the proofs is waived by the introduction of the evidence without objection.

Memorandum.—Action for deceit. Appeal from the Circuit Court of Coles County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

F. K. DUNN, attorney for appellant.

HUGHES & HAYES, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Action on the case brought by appellee, for deceit as to boundary and quantity of a tract of land sold to him by appellant. Plea, not guilty; trial by jury and verdict for plaintiff for \$312.50, which the court refused to set aside and rendered judgment thereon.

The declaration avers that plaintiff bargained with defendant for a tract of land described in the deed annexed, and that defendant took him to the premises and showed what purported to be the lines and corners thereof, and represented to him that they contained seven acres; that the lines and corners so shown were not the true lines and corners of said tract and it did not contain seven but only four and 47-100 acres; that defendant knew it and made the representations falsely and fraudulently; that plaintiff relied on them as true and was thereby induced to buy the tract for \$1,400; that included in the lines and corners so pointed

Peake v. Walton.

out were two lots, 120 by 170 feet together, but they were not included in the true lines and corners.

The errors assigned are improper instructions given for plaintiff and the refusal to set aside the verdict as being against the evidence.

There was no dispute of defendant's ownership of the land as plaintiff claims it was pointed out. He might have lawfully conveyed it, and did convey it, excepting the two lots mentioned, which were by the deed reserved to the grantor. It was very irregular in shape, being what remained of a tract of a little over ten acres in the city of Charleston, out of which he had conveyed eight or nine scattered parcels. He had put it for sale in the hands of Mr. Tooke, a real estate agent in that city, who advertised it as directed by appellant in his column of the Charleston Courier as follows:

"No. 22, seven acres, lots of small fruit trees, good house, six rooms, good barn, fine brick cellar, two wells, one spring living water, orchard, chicken house, large quantity of grapes, No. 1 locality. Only \$1,400. Very cheap."

Appellee had been a farmer, living six miles east of the city. His attention having been arrested by this advertisement, he called on Tooke, who showed him the premises and told him, more particularly than was stated in the advertisement, the terms on which they could be bought. A few days afterward, in company with Mr. Albert C. Ely, he called on appellant. They found Mr. Robert Stewart with him. They all went out upon the land, and appellee, Ely and Stewart say appellant pointed out the boundaries as including the two lots mentioned. Appellant did not deny it, but claimed that he told appellee those lots were reserved. Tooke testified that he also so told him, but appellee contradicted both of them, and Stewart corroborated him as against the statement of appellant. On the question of their reservation and notice thereof to appellee there was no other evidence.

On behalf of appellant it is insisted that if he did represent the boundaries as including the two lots, without giving

appellee notice of his intention to reserve them, and did not include them in his deed, and intended at the time not to include them, those facts show only a failure to convey as much as he agreed to convey, which was but a breach of the agreement, without any element of tort, and that for such breach an action on the case for deceit will not lie; that a promise or agreement to perform an act, though accompanied at the time with an intention not to perform, and which is not performed, is not such a deceit or false representation as will support this action, because it does not assert a fact as existing in the present tense, and the only remedy at law is a suit upon the promise or agreement, citing *Gage v. Lewis*, 68 Ill. 604, 615; *The People v. Healey*, 128 Ill. 9; *Kitsen v. Farwell*, 132 Ill. 327. The law undoubtedly is as thus stated; and the Circuit Court so instructed the jury at the instance of the defendant, but those given for the plaintiff were very likely to appear to the jury to conflict with them.

In our judgment the evidence failed to show a misrepresentation as to the boundaries of the tract in question. On the contrary, it seems to show that the representation made was true, and that the wrong to appellee in that respect, if any, was that the description in the deed did not conform to it. The fraud, if any, was in the reservation of the two lots, which was not the fraud alleged; but no objection was raised to the evidence on the ground of variance. - Had there been, and an attempt made to obviate it by an amendment of the declaration, could it have succeeded? Must not any amendment, to accord with the facts, have more clearly shown a case within the rule declared in *Gage v. Lewis*, *supra*, a breach of an executory agreement to convey a tract bounded as therein stated?

We are strongly inclined, however, to regard that averment as unimportant in this case, and to think that the supposed cause of action thereby stated was not the ground of the verdict rendered. What the appellee suffered and that of which he really complained was the diminution of the quantity, and the averment which covered his case was

Peake v. Walton.

the fraudulent deceit practiced upon him as to the number of acres the tract contained. On account of its shape and the description it necessitated, he could not rely upon any judgment of his own as to the quantity, either from inspection of the tract or from the deed. He might therefore reasonably rely on appellant's representation in relation to it. *Nolte v. Reichelm*, 96 Ill. 428-9; *Antle v. Sexton*, 137 Ill. 410; *Hicks v. Stevens*, 121 Ill. 186. Appellant had been living on it six years. He knew how much the tract he originally bought contained. He had sold out of it all that had since been sold. The evidence fairly establishes the fact that not only by the authorized advertisement, but by direct statement to appellee he represented what remained and what he showed to appellee as containing seven acres. By the survey for appellee of what was conveyed to him, it was found to contain only four and forty-seven one hundredths acres. If he reserved the two lots and so notified appellee, as he claims, there should still remain over six and one half acres. This was a representation of fact, as then existing. There was also evidence tending to show that it was a material inducement to the purchase, and relied on by the purchaser. Did appellant know it was false? He swore that he thought he had sold only about three acres; he just supposed there were about seven left, and that he had no idea how much there was. But this was a question of fact for the jury. The circumstances tend to show that he did know, as he might and should have known, before he made such representations, whether the tract did or did not contain the quantity stated. *Thorne v. Prentiss*, 83 Ill. 99; *Ruff v. Jarrett*, 94 Ill. 479. Upon this question the jury were properly instructed, and we are not warranted to say their finding was clearly against the weight of the evidence. There is no complaint of the amount of the verdict. Judgment affirmed.

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**Cleveland, Cincinnati, Chicago & St. Louis Railway Co.
v. Charles H. Baddeley, Administrator, etc.**

1. **NEGLIGENCE—What the Plaintiff Must Prove.**—In actions for the recovery of damages resulting from negligent acts, it is incumbent upon the plaintiff to show, first, that the defendant was negligent, as alleged in the declaration; second, that the deceased was then and there exercising ordinary care.

2. **RAILROADS—Speed of Trains—When Negligent.**—Within the limits of cities and towns, to run a train at a greater rate of speed than is allowed by ordinance, is legal negligence.

3. **INSTRUCTIONS—Erroneous—When Not Reversible Error.**—The Appellate Court will not reverse a judgment for an error in an instruction when the verdict upon the point in question is right.

4. **ORDINARY CARE—A Question for a Jury.**—In actions for personal injuries it is a question for the jury to determine whether the plaintiff used such care as might be expected of an ordinarily prudent person.

5. **NEGLIGENCE—A Question for a Jury.**—In actions for damages resulting from acts of negligence, the question as to whether the defendant has been guilty of negligence is a question of fact for the jury.

6. **INSTRUCTIONS—Omission in One may be Cured by Another.**—Where an omission in one instruction is cured in others given, it is the settled rule not to reverse for this cause.

7. **NEXT OF KIN—The Husband is, of the Wife.**—Under the statute which provides for damages sustained by the widow and next of kin, the husband of a deceased wife, whose death is the result of negligent acts, may maintain the action.

Memorandum.—Action for damages resulting from negligent act. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

**APPELLANT'S BRIEF, GEO. W. GERE, ATTORNEY; JNO. T. DYE
F. Y. HAMILTON AND EVENS WOOLLEN, OF COUNSEL.**

Plaintiff's intestate in making the unsuccessful attempt to cross in front of the locomotive engine, which she saw and knew was coming, when she could have remained at the side of the track with perfect safety, was guilty of such contributory negligence that a recovery against appellant can not

C., C., C. & St. L. Ry. Co. v. Baddeley.

be sustained. T. W. & W. R. R. Co. v. Jones, 76 Ill. 311; St. L. A. & T. H. R. R. Co. v. Manley, 58 Ill. 300; T. P. & W. Ry. Co. v. Riley, 47 Ill. 514; C. & A. Ry. Co. v. Jacobs, 63 Ill. 178; Abend v. T. H. & I. Ry. Co., 111 Ill. 202; C. & A. R. R. Co. v. Gretzner, 46 Ill. 75; Railroad Co. v. Houston, 95 U. S. 697; Scofield v. C. M. & St. P. R. R. Co., 114 U. S. 615; Penn. R. R. Co. v. Aiken, 41 Am. & Eng. 572; Keeley v. H. & St. J. R. R. Co., 13 Am. & Eng. 638-41-2; State of Maine v. Maine Cent. R. R. Co., 19 Am. & Eng. 314; Kwiotkowski v. Chi. & G. T. Ry. Co., 38 N. W. Rep. 463; Korrady v. L. S. & M. S. Ry. Co. (Ind.), 29 N. E. Rep. 1069; Little Rock & Ft. S. Ry. Co. v. Dinsman, 16 S. W. Rep. 169; L. S. & M. S. R. R. Co. v. Sunderland, 2 Brad. 307.

Under the laws of Illinois the husband is not a beneficiary in this class of cases, he not being next of kin to his wife. R. S., Starr & Curtis, 1290, Sec. 2; Dickens v. N. Y. Cent. R. R. Co., 23 N. Y. 158; Drake, Adm. v. Gilmore et al., 52 N. Y. 389; Townsend et al. v. Radcliffe, 44 Ill. 446; Gauch v. St. L. M. S. Ins. Co., 88 Ill. 251; 1 Bouvier's Law Dic., "Kindred," 691; Anderson's Law Dic. "Kin," 589; Haraden v. Larrabee, 113 Mass. 431; Wetter v. Walker, 62 Ga. 145; R. R. Co. v. Winn. 42 Ga. 331; Lovett v. R. R. Co., 55 Ga. 143.

APPELLEE'S BRIEF, KERRICK, LUCAS & SPENCER, ATTORNEYS.

The point in appellant's brief is that "under the laws of Illinois, the husband is not a beneficiary in this class of cases, he not being next of kin to his wife." A number of cases are cited supporting that contention. Were the question an open one in this State, it would seem somewhat doubtful and uncertain on the authorities cited by appellant. But it is not an open question in this State. The Supreme Court, in the case of *The City of Chicago v. Major*, 18 Ill. 359, have settled the question; and the very question suggested by counsel of appellant, is anticipated in that case by the Supreme Court. Justice Caton, speaking for the court, says: "Should we adopt the construction contended for, we should have to hold that no remedy is given to the husband for the

loss of the wife. We can not believe that the legislative mind was actuated by such narrow and limited intentions when framing the first section of the act, which alone gives the cause for action."

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This action was brought by the appellee as administrator of Emily Humphrey against the appellant, to recover damages for negligently causing the death of the said Emily Humphrey.

The plaintiff recovered a verdict of \$4,000, of which the sum of \$1,500 was remitted, and judgment was rendered for \$2,500, from which the present appeal is prosecuted.

The declaration averred that the death was caused by reason of the negligence of the defendant in the management and running of a certain locomotive over the road of defendant, whereby the said locomotive ran upon and struck the said deceased, who was then attempting to cross the track, and who was then exercising ordinary care.

Upon the trial the defendant offered no evidence, and rested on that offered by the plaintiff, insisting then, as it does now, that no sufficient cause of action was disclosed by the plaintiff's proof.

In order to recover, it was incumbent upon the plaintiff to establish:

1st. That the defendant was negligent, as alleged in the declaration.

2d. That the deceased was then and there exercising ordinary care.

By the errors assigned, the appellant calls upon us to determine whether the evidence is sufficient to support the verdict, judging of the same according to the well recognized rules applicable in a court of appellate jurisdiction, when considering a judgment brought before it for review.

It appears that the appellant's line of railroad passes through the city of Leroy, in McLean Co., the general direction being from the southeast to the northwest. At the intersection of Center street, which runs east and west, with

Buck street, which runs north and south, there is a crossing over the railroad, at grade, for both streets, with a sidewalk crossing for foot passengers. The deceased and her sister, Mrs. Richards, were walking along the sidewalk on Center street, going west, and as they came near the track they observed a train, as they supposed, approaching from the northwest. Mrs. Richards asked the deceased whether there would be time to cross, and the latter replied: "Yes, plenty; it is way beyond the depot." They were then on the side track, which was but a few feet from the main track. Mrs. Richards says they then quickened their speed somewhat, and passed on to the main track, and just as she stepped over the west rail she looked around and saw the engine was near them and coming very rapidly. She escaped, but the deceased, who was upon her left, was caught and carried by the side of the engine some distance, causing her death within a very few moments.

As to the alleged negligence of the defendant; the supposed train proved to be a locomotive, with no cars attached, passing from northwest to the southeast. It was running at a very high rate of speed. By the municipal ordinance then in force, the legal rate of speed was fixed at fifteen miles per hour. It is a matter of opinion, merely, as to the actual speed. Some of the witnesses place it at fifty miles per hour—others at forty—one says twenty-five or thirty when he first saw it after the deceased had been struck—others say over fifty, and others who do not attempt to fix the rate in miles per hour, use various forms of expression—for instance, one says it was going faster than he had ever seen a train or an engine go before; another says "it went by like a flash;" another that it went "as though shot out of a gun." And it appears that after striking the deceased, it ran nearly a quarter of a mile before it was stopped. The speed, being in excess of that allowed by the ordinance, was illegal, and this was negligence, as a matter of law. It was unnecessarily and unusually high, and it might perhaps be said under the circumstances to be so reckless as to amount to gross negligence.

We are not unmindful that railroads have the right to make such speed as they may deem necessary, having due regard for the safety of passengers and of persons who may have occasion to cross the track, except so far as controlled by municipal ordinances, and that the public demand for rapid transit seems to compel very high rates of speed for more or less through traffic on all railroads.

Yet, the speed may be so great as to amount to negligence, when all the circumstances are taken into consideration.

When such trains are run with proper care in the matter of giving signals, and when not controlled by local ordinances, they may, perhaps, pass through towns and cities at the rate of forty or fifty miles per hour without being subject to the imputation of negligence. In such case there is a seeming necessity, or at least justification, for the high speed, and there is no violation of municipal ordinance involved. Certainly, we could not say as matter of law, that such speed would, under such circumstances, be negligence *per se*. Here, however, there was a violation of law. The ordinance fixed the rate reasonably and was a valid regulation.

Moreover, there appears to be no justification for such a speed at such a place for a mere locomotive and tender; *prima facie*, it is unnecessary and reckless. It involves risk and hazard to life and property without occasion and should be condemned as clearly, if indeed not grossly, negligent. In this connection, and to avoid repetition, we may notice the objections urged to the first and third instructions given at the instance of the plaintiff. As to the first, it is said that it assumes the defendant was negligent in the matter alleged in the declaration. We think it does not so assume, but rather states the alleged negligence as hypothetical.

As to the third, it is urged that it singles out the specific fact that the speed was in excess of the rate fixed by ordinance, and thereby calls the attention of the jury specifically to that feature of the case. Conceding that these instructions are faulty in the respects urged, yet we ought not to reverse for such cause when we are bound to say that upon

this point of the defendant's negligence, the verdict was right. Indeed, we must say that no other conclusion on this point was justified by the evidence. Hence, it is wholly immaterial whether these instructions are obnoxious to the objections urged.

Assuming then, as we do, that there was sufficient evidence of negligence on the part of defendant, it remains to inquire whether upon the point of the care, or want of care, of the deceased, the verdict is so far opposed to the evidence as to require the interference of this court. Counsel argue that deceased saw the locomotive; knew it was coming toward the crossing, and that, in voluntarily attempting to cross in front of it, she was guilty of such negligence as precludes recovery.

It is urged with much vigor that it has often been said, judicially, that such conduct is negligence in and of itself.

No doubt it has often been so declared in the opinions of courts of last resort, by way of argument and as applied to the case under immediate consideration. Such expressions are not infrequent in the reports of the Supreme Court of this State. But it is also and equally true that, in this State, at least, negligence is a question for the jury, and that the court would not instruct that a particular act of failure to look or listen for an approaching train, or of attempting to cross in front of a train, is *per se* negligence. Any such act, not being in violation of legislative or municipal enactment, is not necessarily negligent, and is not to be so declared by the court to the jury.

The fallacy of appellant's argument is in the assumption that, because the deceased knew the engine was approaching she was necessarily negligent in attempting to cross in front of it.

Manifestly it was a question for the jury to determine whether she used such care as might be expected of an ordinarily prudent person. *Penn. Co. v. Frana*, 112 Ill. 398; *C., St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587; *C. & A. R. R. Co. v. Adler*, 129 Ill. 335.

It is true, as a general proposition, that in the exercise of

ordinary care, a person will not go upon a railroad track without taking the precaution to ascertain whether a train is approaching, and if a train is seen approaching, ordinary prudence will forbid attempting to cross in front of it, when it is dangerously near, or indeed so near as to induce a calculation of chances. But if the train is so far away as that it is apparently safe to cross one may prudently attempt to do so. If, for instance, it is a mile away, there would be no imprudence in the act. If the distance is a half mile or a quarter of a mile or even less, still it must be a pure question for the jury whether, under the particular circumstances, the act was prudent. The circumstances must be taken into account, and if they are such as to mislead or deceive an ordinary person as to the speed or distance of the coming train, due allowance should be made therefor in estimating the action of the person injured. In the present case the deceased did see the engine approaching; she thought it was at a point beyond the depot, some six or seven hundred feet from the crossing where she was. The situation was such that she was facing the engine, or nearly so, and therefore she might have been mistaken as to its distance and might more easily have been mistaken as to its rate of speed.

If she was not mistaken as to the distance (and we learn what she thought about it as well as what Mrs. Richards thought, from the testimony of the latter, as to which there is no positive or direct contradiction), then it is probable the speed was considerably more than fifty miles per hour. But whether mistaken or not, it is difficult to see upon what ground we shall say that the jury could not reasonably find that the deceased, under all the circumstances, acted as any ordinarily prudent person would. The very high rate of speed is sufficient to account for the mistake of the deceased in supposing she could safely get across.

She was familiar with the locality, and as she told her sister, she had narrowly escaped at that point once before. She thought there was ample time, and they somewhat quickened their pace. It does not appear that the engineer gave warning of his dangerous proximity, nor is it indeed proved

that he saw them; but it was his duty to keep a lookout and it is hardly credible that he did not see them in time to sound the whistle.

We are not disposed to say that the finding of the jury upon the question of the care shown by deceased is so far opposed to the evidence as to justify a reversal for that ground. If the speed was so much greater than it should have been, and as from the standpoint of the deceased it appeared to be, then the mistake she made was caused by the negligent conduct of the defendant, and it is not for the latter to set up such mistake as a bar to recovery.

After a careful consideration of the matter we feel content to rest upon the verdict as to this branch of the case.

It is urged that the second instruction for plaintiff failed to state as essential to recovery that the deceased used ordinary care.

Assuming that this instruction is so faulty we find that the first, second and third, for plaintiff, contain this qualification, and that it is plainly and strongly stated in no less than seven different instructions given for the defendant. There is no conflict in the instructions, but only an omission in one which is amply cured in others given for the plaintiff as well as the defendant, and when this appears it is the settled rule not to reverse for this cause. It was so held in *Willard v. Swansen*, 126 Ill. 381, as it had been held before and has frequently been held since.

It is further objected that the fourth instruction for the plaintiff authorized the jury to allow "proper pecuniary compensation for damages to the husband and next of kin," and that the jury were not confined to the statutory rule which permits only a fair and just compensation with reference to the pecuniary injuries resulting from such death.

Possibly the instruction might be deemed somewhat uncertain and the jury might not understand that they could allow nothing beyond compensation for pecuniary loss (though probably there would have been no misconception on this point), had it not been aided and supplemented by others; but we find that in at least two given for defendant the rule

of the statute was so plainly set forth that misunderstanding was impossible.

There was proof as to the pecuniary loss sustained by the husband, who, by reason of the peculiar facts proved, was dependent upon the deceased for support.

The verdict of the jury was reduced by remittitur to \$2,500 as already stated, and we think the judgment as it stands is not excessive in any view proper to be taken of the evidence.

The point remaining for consideration is that there can be no allowance for damages for the loss sustained by the husband on account of the death of the wife.

In the case of *The City of Chicago v. Major*, 18 Ill. 359, the Supreme Court had occasion to construe the language of the statute which provided for damages sustained by the "widow and next of kin," and while this precise question was not then involved the court remarked: "Should we adopt the construction contended for we should have to hold that no remedy is given to the husband for the loss of the wife. We can not believe that the legislative mind was actuated by such narrow and limited intentions when framing the first section of the act, which alone gives the cause of action." So far as we are advised this view has been generally accepted by the courts and the profession. While in other States a different view may have prevailed as to the meaning of substantially the same terms in their local statutes, yet we are not inclined to depart from a construction so well recognized and so equitable.

The judgment will be affirmed.

John P. Perisho v. John Quinn.

1. **FRAUDULENT CONVEYANCES**—*Secret Trust*.—A deed, though absolute on its face, but subject to a secret trust in favor of certain creditors, is fraudulent and voidable because it is designed and intended to hinder and delay creditors.

Memorandum.—Creditor's bill. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding.

Perisho v. Quinn.

Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

H. S. TANNER and F. W. DUNDAS, attorneys for appellant.

H. VAN SELLAR, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee obtained a decree in chancery against appellant requiring him to pay the sum of \$216.21 and costs, from which the present appeal is prosecuted.

The bill alleged that the appellee was a judgment creditor of one Wm. H. Perisho, and that in order to hinder and delay his creditors the latter had deeded a valuable farm to one Jonathan Perisho, who afterward, for the same purpose, deeded it to the appellant. The farm was incumbered by mortgages for more than half its value, and it was shown that Jonathan Perisho as well as the appellant had an unsecured demand against the said Wm. H. Perisho. Doubtless it was intended to cover and secure these claims, and the theory of the bill was that the appellant was to hold the land as long as desired by the said Wm. H. and then to sell and account to him for the surplus. It appears that the land was subsequently sold for \$10,500, which was the sum total of all the liens upon the land and the claims of Jonathan Perisho and the appellant, as the latter alleges, but according to the position of appellee this sum also covered and included a false and pretended note for \$300, which was given without consideration and for the sole purpose of making up the amount for which the land was sold.

Appellee also insisted that the claim of appellant against Wm. H. Perisho was not really as large as alleged, aside from this \$300 note. It was further insisted that the said Wm. H. Perisho had received from the appellant a considerable amount of money in pursuance of the arrangement. We think the evidence justifies the conclusion reached by the court that the deed, though absolute on its face, was sub-

ject to a secret trust in favor of the said Wm. H. Perisho, and that it was fraudulent and voidable because it was designed and intended to hinder and delay creditors.

The argument of appellant is devoted mainly to an effort to demonstrate that the evidence does not warrant this conclusion as a matter of fact. There is no question as to the rule of law applicable.

It seems that whether the decree is right, depends very much upon the credit to be given to the testimony of Wm. H., Abram, Jonathan and Leander Perisho. The contention is that the testimony of the first is discredited, because it is not in harmony with what he testified in another case brought by other creditors for the purpose of impeaching this same transaction.

And it is argued that there are various considerations which discredit the others.

It is not necessary to go into details or to discuss the objections suggested.

The testimony in the present record is not so opposed to common experience as to excite any suspicion. While it may not be truthful, it is not remarkable. The chancellor who saw the witnesses and heard their oral statements, could determine their veracity better than we. There are many features of the transaction which tend to sustain the evidence upon which the decree is based. The conclusion reached is probably correct; certainly there is no good reason for disturbing it.

The decree will be affirmed.

**Eunice E. Clark, Administratrix of the Estate of Frank
P. Clark, deceased, v. The Wabash
Railroad Company.**

1. INSTRUCTIONS—*Verdict for the Defendant.*—In an action against a railroad company for damages resulting from a death caused by negligence, it not appearing from the plaintiff's evidence that anything which the company had done tended to render the risks of the service more

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Clark v. Wabash R. R. Co.

hazardous than they ordinarily were, and it not appearing that the deceased was in the exercise of ordinary care for his personal safety, the jury were properly directed to return a verdict for the defendant.

Memorandum.—Action for damages. Death from negligent act. Error to the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

GEO. B. BURNETT, attorney for defendant in error.

BRIEF FOR PLAINTIFF IN ERROR, BROWN, WHEELER & BROWN,
ATTORNEYS.

Where the evidence tends to prove the issue, and it becomes necessary to give effect to it by weighing it, the province of the jury is invaded by taking the case from the jury. This is the only reasonable view to be taken so long as the trial by jury is maintained. If the court is to weigh the testimony, there is no duty for the jury to perform. In support of this view we cite the following cases: Pennsylvania Co. et al. v. Ellitt, Adm'r, 132 Ill. 654; Hall et al. v. First Nat. B'k of Emporia, 133 Ill. 234; Chicago, St. L. & P. R. R. Co. v. Gross, Adm'r, Ibid. 37; Miller v. Pence et al., 131 Ill. 122; Anthony et al. v. Wheeler, 130 Ill. 128; Wright Fireproofing Co. v. Poezekai, Ibid. 139; Chicago & N. W. R. R. Co. v. Dunleavy, Adm'r, 129 Ill. 132; Hodges v. Bearse, Ibid. 335; Chicago & N. W. R. R. Co. v. Snyder, Adm'r, 128 Ill. 655; Hamburg-American Packet Co. v. Gattmann, 127 Ill. 598; The People v. People's Insurance Exchange, 126 Ill. 466; Chicago, Mil. & St. P. R. R. Co. v. Krueger, 124 Ill. 457; 23 Ill. App. 639; L. S. & M. S. R. R. Co. v. Brown, Adm'r, 123 Ill. 162; O'Sullivan, Adm'r, v. C., M. & St. P. R. R. Co., 23 Ill. App. 646; Wood, Adm'r, v. Ill. C. R. R. Co., Ibid. 370; The People, etc. v. Nedrow, 16 Brad. 192; Whalan, Adm'r, v. Ill. & St. L. R. R. & C. Co., Ibid. 320; Reidle v. Mulhausen, 20 Brad. 68; Hinsdale-Doyle Granite Co. v. Armstrong, 6 Brad. 315; Waller v. Carter, 8 Brad. 511; Ward v. City of Chicago, 15 Brad. 98.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by plaintiff in error to recover damages for the death of Frank P. Clark, her intestate, alleged to have been caused by negligence of the defendant in error.

When she rested her case the defendant moved the court below to exclude the evidence and direct a verdict of not guilty, which was allowed, and a verdict returned accordingly. The propriety of this action on the part of the court is the main question presented by the assignments of error.

It appears that the deceased was engineer of defendant's fast passenger train, No. 42, going east from Springfield to Tilton in the night of August 7, 1891, and that at a point a short distance west of the west switch at Homer it ran into the second section of the freight train, No. 92, on the same track and going in the same direction, whereby he was killed. His train being late, he received a special order from the train master at Decatur, to run twenty minutes behind its schedule time, a copy of which was furnished to each section of the freight. By this extension it would be due to pass Sidney, which is a little over six miles west of Homer, at 11:59 P. M. It was not scheduled to stop at either of those places. Sidney was a telegraph station, with an operator in defendant's employ, and connected by working wire with the office of its train master, and also a signal maintained for the purpose of stopping trains for orders.

Clark had been running as engineer in that district eight years. He frequently hauled freight trains. He was perfectly familiar with the rules and practice of the company in reference to the running of its trains. One of these rules was as follows: "Passenger trains in passing through stations without stopping will reduce their speed before passing the first switch and run carefully through section limits till they know the track is clear." Others prescribe that a train of inferior rank must clear the time of trains of superior rank at least five minutes; that is, must be on the side track, have switches set up and everything clear at

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least five minutes before the train of superior rank is due; and if a freight train is stopped on the main track by any obstruction whatever, the flagman, who is the rear brakeman, is required to go back immediately a certain distance with prescribed signal lanterns, put on the track two torpedoes, thirty feet apart, and remain within a short distance until called in by the whistle of his engine, when he is to remove one of them and return to the train. The red light swung across the track horizontally with it, is a signal of danger, which the engineer of the following train must answer with two short blasts of the whistle, indicating that he has seen it, and shut off steam and stop as soon as he can. On the rear of each freight train caboose are three red lights, one in the cupola and one on each side at the end. These red lights indicate a freight train and on the main track. When it is in, so as to clear that track, these lamps are turned, showing green to the rear. They are provided with sockets so that they can be turned and held in a certain position. Those lights could be seen at Homer from the west for a little over two miles, the track being straight and clear.

These are standing general regulations, printed on the time card furnished to every engineer. All the trains on appellee's road are regular and scheduled, and these time cards show when every one is due at each station. In case a following train having the right of way is for any reason delayed, a special order is given to it changing the schedule time for that run; all other trains to be affected by it are advised of such change and the general rules for preventing collision are applied to the time fixed by the special order.

On the night in question the freight left Sidney at 11:46, thirteen minutes before the passenger was due. The time allowed by schedule for its run to Homer was fifteen minutes. The passenger passed Sidney at four minutes past twelve, being five minutes late. Its schedule time for the run to Homer was nine minutes.

It thus appears that had the freight made the run, as it probably did, in the time allowed, it would have reached

Homer at one minute past twelve, and had the passenger been on time at Sidney and made the run to Homer in the time allowed, it would have passed that station seven minutes later, leaving to the freight time enough to clear the main track fully five minutes before the passenger was due, as required by the rule. But it happened that the side track at Homer was found to be occupied by the first section of the freight. It then became the plain duty of the second section to show the red lights on the caboose and send back the flagman with torpedoes and signals to stop the passenger.

How far that duty was performed or neglected, was not clearly shown. It seems that plaintiff was obliged to rely for proof on the testimony of defendant's employes. Neither of the train hands on the second section was called as a witness. But the testimony of the train master had some tendency to prove that those lights had been properly displayed. One of the lanterns was found in the ditch about five feet from the track. He saw it immediately after one of the men picked it up, and carefully examined it. It was but slightly battered, though the caboose had been torn to pieces. He says he knows the right position of the red in the socket and it was in that position. The conductor of the passenger, who was in the baggage car at the time of the collision and was stunned, got back to the rear of his train as soon as he could—in four or five minutes—and shortly afterward saw the conductor of the second section coming from the west back to the wreck, and says that he had been out to flag the passenger. Perhaps it was because of this testimony of the train master and the conductor of the passenger, that the train hands of the second section were not called.

If they performed their duty as prescribed by rule 99, the collision must be attributed, according to the evidence, to the fault of the deceased. From the testimony of his fireman and conductor, it would appear that he did not whistle for Homer, nor take any measure to slacken his speed until within a few seconds of the collision, but was going at the

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rate of thirty to forty-five miles an hour when it occurred; and this, in the face of warning signals visible for two miles.

The declaration contained seven counts. They charge a negligent disregard by defendant of several duties stated by counsel as follows : First, to hold the second section of 92 at Sidney, until 42 passed in safety; second, to designate a place where the second section of 92 should go upon the side track and allow 42 to pass; third, to stop 42 at Sidney and apprise the men in charge of it of the danger.

As to the first, we have seen that 92 had the start of 42 of thirteen minutes in a run of six and one-tenth miles and that the difference of time between the two trains in making it was only six, so that at Homer 92 would still be seven minutes in advance. Why, then, in any view, should it have been held at Sidney until 42 passed, unless it was known that the first section was occupying the side track at Homer, of which there was no evidence. Homer was not a telegraph station.

And the same conditions made it equally unnecessary for the company, through its train master, to designate a place where the second section should go upon the side track to allow 42 to pass, or to stop 42 at Sidney. A simple application of the general rules to known facts would indicate to those in charge of these trains their respective duties, and in such cases as this it must be left to their intelligence and responsibility to make the application. The conductor and engineer of 92 at Sidney knew when 42 was due there, the distance to Homer, the time allowed to make the run, the condition of their own train and the character of the track. If with this knowledge their judgment was that they had ample time in which to make the run and be on the side track at Homer at least five minutes before 42 would be due there, they could properly go on; but if there was any reason to doubt it, their plain duty was to remain on the side track at Sidney until 42 passed. The rule for them is in cases at all doubtful to be on the safe side. If the conductor and engineer of 42 found the main track clear at Sidney they

could properly go on, but it was as certainly the duty of the engineer to be looking out for signals of danger from preceding trains, to whistle for Homer, to slacken speed and run carefully as he approached it and until he knew the track was clear. A proper observance of these general rules would prevent accidents as far as seems possible, or at least practicable. No special order was required for either train. The train master, with twenty years of experience in that department and familiar with the methods and rules adopted on all the great trunk roads for moving their trains, testified that it is impracticable for the company or the train master to give special orders in such case, and if practicable it would be unwise to do so. This was matter of opinion or judgment. We think he was competent, as an expert, to state his opinion. But he also stated the facts upon which it was based, and if his opinion, which was objected to, had been excluded, we can not see that it would or should have changed the result. The court was enabled to determine from the facts he testified to, whether the failure of appellee to issue a special order to side track 92 at Sidney, or designate a place for the passing of 42, or stop it at Sidney and apprise the persons in charge of the supposed danger, was or was not evidence of negligence on its part. It seems unnecessary to repeat his statements here. We concur in the view of them taken by the court below. In *I. C. R. R. Co. v. Neer*, 31 Ill. App. 134-5, we said: "Whether the system of appellant was consistent with due care was a question for the jury. But it was to be determined upon the evidence, in reference to which, on the former appeal, we said that 'whether this reasoning and these opinions should be adopted or not, there is in this record really no conflict in the evidence as to the propriety of the rule; and if the practice of the appellant is to be condemned, it must be upon a conclusion reached independent of and discarding the opinions of these expert witnesses. We think that neither the court nor jury has such knowledge of the subject-matter as to justify such a conclusion.'" 26 Ill. App. 356. So here, the evidence shows that

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the system in question was adopted long before this accident occurred, and was intended to apply to such a case; that "these rules are in force on other roads; that they were formulated by what is called the general time convention, an association of general superintendents of leading trunk lines, were the outcome of several years' discussion, and have been more effective to prevent accidents than any other rules that were ever in existence." There was no contradiction of any statement of the train master, whether of fact or opinion, and so any finding to the contrary must have been arbitrary, unreasonable and without evidence.

The sixth count avers that the defendant committed the movement and running of 92 to one Snape, who, by direction of defendant, had authority to command its movements and control the persons employed thereon; that by virtue of such authority he represented the defendant and was vice-principal with respect to its movements; that acting under such authority in place and stead of defendant, he negligently obstructed the track, etc.

The train master positively denied that Snape had such authority, and stated that the conductor and the engineer controlled the movements of the train; that it is not the duty of the engineer to obey the signal of the conductor unless the time card gives him the right to go, so that responsibility in case of trouble, rests equally on both; that it was the duty of both to fix meeting and passing points, and no one on the train can authorize it to go further or shorter on the time of a superior train. And on that point also he was wholly uncontradicted.

It thus appears to us that there was no evidence on which the jury could, with any show of reason, find the defendant guilty, directly or through any person authorized to represent it, of culpable negligence. *Bartelott v. International Bank*, 119 Ill. 259. If, then, the deceased was in the exercise of ordinary care, and the collision was due to the fault of the train men on 92, the injury was caused by negligence of his fellow-servants. *O. & M. Ry. Co. v. Robb*, 36 Ill. App. 627.

Several passenger engineers were introduced to prove that

their personal association with conductors of freight trains is slight, but they all testified to a general and perfect understanding of the perils they encounter in the negligence of those running freight trains. Hence, whether Snape or his engineer were or were not fellow-servants of the deceased, according to the test furnished by the *Moranda* case, 93 Ill. 302, the negligence of the employes on such trains was one of the dangers ordinarily and necessarily incident to the service in which he was engaged; and it can not be claimed that he lost his life through anything that appellee did to render the service more dangerous than it was known to him to be before he engaged in it. For that reason there could be no rightful recovery in this case. *Clark v. C., B. & Q. R. R. Co.*, 92 Ill. 42, and cases there cited.

Finally, there was no attempt to prove, distinctly, that the deceased was in the exercise of ordinary care for his own safety. It might be, however, and generally is, where it is a fact, sufficiently indicated by the circumstances. Here it was not so indicated. He ran into the freight train only a short distance west of the west switch, at full and high speed, when ordinary prudence and the positive command of the master required that he should be running there at a slackened speed and with special care. This was an essential element of appellant's case, and for a total failure of proof tending to show it, whatever it might be on other points, the jury would be properly directed to return a verdict for the defendant. We find no material error in the record. The judgment will therefore be affirmed.

William M. Story v. Charles W. Jones.

1. SLANDER—*Words Not Actionable in Themselves*.—To say of a man that he belongs to the Missouri Home Guards, and that it is a band of robbers, is not actionable *per se*.

2. SLANDER—*Measure of Proof*.—Proof of enough of the identical words charged to constitute substantially the imputation of the whole is sufficient.

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Memorandum.—Action for slander. In the Circuit Court of DeWitt County; the Hon. CYRUS EPLER, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for defendant; plaintiff appeals. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

F. B. McKENNAN, FRED BALL and R. A. LEMON, attorneys for appellant.

V. WARNER and FULLER & INGHAM, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Action on the case for slander brought by appellant; plea, not guilty; trial by jury and judgment on verdict for defendant.

The words charged in different counts were, "William Story belonged to a band of robbers" in Missouri. "He was a thief." "He was a horse thief." "He belonged to a band of robbers." That defendant "understood he (plaintiff) belonged to the Home Guards in Missouri, and they were reported to be a band of cut-throats, horse-thieves and robbers," meaning and intending to charge that the plaintiff was associated with other persons in committing murder, stealing horses and committing robbery.

It appears that on one occasion the defendant was speaking to two persons of the plaintiff, one of whom testified that he called him "a thief," but the other contradicted him and the defendant also emphatically denied it.

On another he was speaking to three, each of whom testified that he said the plaintiff "belonged to a band of cut-throats, horse-thieves and robbers in Missouri." Defendant stated that what he told them was that he had always heard the plaintiff belonged to the Missouri Home Guards, and that the people of Missouri told him that the Missouri Home Guards and the rebel Home Guards were both cut-throats and robbers; and that he didn't know whether plaintiff belonged to them or not. Two of the three witnesses referred

to also say he said plaintiff belonged to the Home Guards in Missouri.

The parties have long been neighbors—all their lives, excepting the five or six years that plaintiff was in Missouri—on adjoining farms. Plaintiff dealt largely in horses and mules. On each of the occasions mentioned, defendant was complaining of him for letting his stock out on the road; said his own fence was broken down and his corn eaten by them; threatened to prosecute him for allowing them to run at large, and applied some harsh epithets to him. Among other things, he said plaintiff was stealing the grass growing on the road. Hence, the witness Lochner, may have come to think the word “thief” was used. If it was, the reference was plainly to the grass, and a finding that it was not used, should not be set aside for want of evidence to support it.

The Home Guard of Missouri was a lawful organization. To belong to it was not criminal nor disgraceful. Such organizations are made up of the good and the bad. The bad, though a minority, might give it a reputation; but from the statement that such a body of men was a band of robbers, no sensible person would understand the speaker to mean that any particular member or that every member was a robber. It would be so understood only in reference to a body understood to be organized for robbery. The Home Guard of Missouri was not so understood. To say of plaintiff, then, that he belonged to that body and it was a band of robbers, was no more than to suggest that perhaps, it might be, that he was a robber, or associated with others in the commission of robbery. We think that is all he was shown to have said on that subject, and that it is not actionable *per se*. No special damage was alleged.

Upon this ground, the second refused instruction asked for the plaintiff was bad; and all that was good in the first was contained in the fourth and fifth given.

It is said that these, with two others, were improperly modified by interpolating, in some instances one, and in others both, of the words “falsely” and “maliciously” in

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phrases "If the jury believe from the evidence that the defendant falsely and maliciously spoke the following words," etc., as requiring express proof that the slanderous charge was false and malicious.

In this case the words charged were treated as actionable *per se*—of themselves and unexplained, importing crime. But even such words, to be slanderous, must be falsely and maliciously spoken. There was, therefore, no impropriety in the interpolation of those words to characterize the speaking. The complaint is, that the jury is required to find these characteristics from the evidence. But how can they find any fact except from evidence, or what stands for evidence? The court fully and properly advised the jury as to the legal presumption, standing for evidence, and conclusive evidence, of falsity, malice and damage, applicable under the pleadings.

In the seventh instruction for plaintiff, which was given as asked, a part of the hypothesis is "and that the slanderous words uttered by the defendant were maliciously spoken."

We see no error in the modifications complained of. Several of those given for the defendant are to the effect that plaintiff, to recover, must prove the words charged in the declaration, or some count thereof, which counsel insist necessarily implies all of the words so charged.

The object of these instructions, manifestly, was to emphasize the point that proof of equivalent words would not suffice. Undoubtedly the law is that proof of enough of the identical words charged to constitute substantially the imputation of the whole, is sufficient. In this case, however, there was no occasion for the qualification. All of the words charged in any statement that any attempt was made to prove, were testified to, namely, that plaintiff was "a thief," that he "belonged to a band of cut-throats, horse-thieves and robbers," and that he "belonged to a band of cut-throats, horse-thieves and robbers in Missouri." Probably for that reason it was not asked by plaintiff. Its omission was harmless.

The direction concerning a special finding in defendant's instruction was also given in those numbered ten and eleven for plaintiff. He therefore can not complain of it, if it is improper, which we do not concede. It does not call for any opinion, but a finding as to a material and ultimate fact.

Objection was sustained to two questions put to defendant on cross examination. They were in substance alike, and nearly so in form. It had been put in better form and answered once already. These assumed what the witness had not said, and his opinion of plaintiff's honesty which he had not given.

Finding in the record no material error on the part of the court and believing that upon the evidence justice was done, the judgment will be affirmed.

**Jeremiah Martin et al. v. Commissioners of Highways,
etc.**

1. APPEALS AND WRITS OF ERROR—*Freehold Involved*.—When the object of a writ of certiorari was to test the validity of the proceedings by which the road was established, a freehold is involved.

Memorandum.—Certiorari. Error to the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1893, and writ of error dismissed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

BAILEY & HOLLY and NEECE & SON, attorneys for plaintiffs in error.

SHERMAN & TUNICLIFF, attorneys for defendant in error.

PER CURIAM.

The plaintiffs in error filed their petition in the Circuit Court for a writ of certiorari to be directed to the town

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clerk, for the purpose of bringing up the proceedings of the commissioners of highways in laying out a new road and vacating an old one therein described. The petitioners are owners of land affected by the said highway, and it was alleged that the proceedings were irregular, wherefore the petitioners prayed that the same be quashed.

The court on motion quashed the writ of certiorari and dismissed the proceedings. The record comes here by writ of error, sued out by the petitioners.

We find that the object of the writ of certiorari is to test the validity of the proceedings by which the road was established, and this upon the authority of *Chaplin v. Commissioners of Highways*, 126 Ill. 264, and the *Town of Brushy Mound v. McClintock*, 46 Ill. App. 263, involves a freehold.

We must therefore dismiss the writ of error with leave to plaintiff in error to withdraw record, abstracts and briefs.

William Songer v. L. B. Wilson.

1. INSTRUCTIONS—*To Be Based upon the Evidence.*—Instructions should be based upon the evidence in the case and where the evidence is conflicting, they should state the law accurately.

Memorandum.—Assumpsit for real estate broker's commissions. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

SALMANS & DRAPER, attorneys for appellant.

CALHOUN, STEELY & JONES, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee was a real estate agent and had, in the person of one Hersberger, a prospective purchaser for a farm of 100

acres owned by the appellant. He and appellant entered into a contract, by the terms whereof appellant was to accept \$60 per acre for the land and appellee to receive as compensation, for inducing Hersberger to buy, all above the ~~of~~ of \$60 per acre that could be procured from him.

The appellee contends that he brought the appellant and Hersberger together and that they, in the presence of one Bailey, appellee's agent, entered into a verbal contract for the purchase and sale of the land at \$62 per acre, but that Hersberger, after the contract had been concluded, having learned that the appellant's price upon the farm was but \$60 per acre, returned to the appellant, and in the absence of appellee or his agent, persuaded him to close the contract for the farm at \$60 per acre, and the sum of \$25 in addition thereto.

Appellee brought this action to recover as his compensation under the contract \$2 per acre upon the 100 acres of land so sold by appellant, and obtained a judgment in the sum of \$200, from which this appeal is prosecuted.

Appellee's right of recovery on the basis of \$2 per acre, rests upon his contention that Hersberger contracted to buy the land at \$62 per acre, as his compensation was to be only the excess above \$60 per acre.

Appellant denies that Hersberger ever contracted or agreed to pay, or was willing to pay, \$62 per acre. Hersberger, the appellant, and Bailey, an agent of the appellee, were the only persons present when it is alleged a contract was made for the sale of the land at \$62 per acre.

The appellant and Hersberger testified that no such contract was made and the latter denied that he ever agreed to or was willing or ready to buy the farm at that price. Bailey testified that the contract was made as the appellee contends it was, and other witnesses testified to statements of the appellee and of Hersberger, corroborative of the testimony of Bailey. Appellee's right of recovery rested solely upon the truth of this contention in his behalf.

This conflict of evidence presented a fair question of fact for the determination of the jury, whose finding upon it

should not be disturbed, unless the court by erroneous instruction, improperly interfered with a fair and impartial consideration of the question as a pure question of fact.

Appellee's right of recovery rested solely upon this proposition, that Hersberger and the appellant entered into a contract for the purchase of the farm at \$62 per acre, and that appellant permitted Hersberger to induce him to recede from the contract.

Unless the jury believed from a preponderance of the evidence that such a contract had been concluded between those parties, the appellee had no right to recovery. He was not to be compensated by way of any agreed commission upon the amount of the sale nor upon the basis of the reasonable value of his services, but he undertook to bring about a sale at a price in excess of the amount the appellant was willing to accept for the land, upon condition that he should receive such excess for his services.

Whether he did bring about such a sale, and thereby became entitled to such excess, was the question for the jury to decide; yet the appellee asked and obtained from the court, instructions wholly ignoring this material question upon which his right of recovery solely rested, and directing a verdict in his favor if his acts in any way conduced to a sale and Hersberger bought the land at any price whatsoever. To illustrate, these second and third and fifth instructions asked by, and given for the appellee, are as follows:

2. "If, after hearing all the evidence, you can say you can believe from a preponderance of the evidence, that the defendant put his real estate in the hands of the plaintiff for sale, and that the plaintiff brought the purchaser and defendant together, and that as a result the defendant sold the real estate in question to the buyer with whom the plaintiff had started the negotiations, then and in that case your verdict should be for the plaintiff, for whatever sum you may find due him according to the contract between them, if you find there was such a contract.

3. "The court instructs the jury, that when the owner of real estate puts the same into the hands of an agent

to sell on commission, and the agent brings the owner and purchaser together, and they then continue the negotiations and consummate the sale, the agent is entitled to his commission, even though the owner, in order to make the trade, agreed with the purchaser to take a less sum than was at first given to the agent.

5. "The court instructs the jury, that where plaintiff is employed by defendant to assist in selling a farm, with the promise of a certain compensation in case the same is effected, and such plaintiff does assist in bringing about a sale, he will be entitled to recover the sum agreed to be paid, even though the defendant had changed his proposition, with a view to dispense with the plaintiff's services, when the plaintiff received no notice of such fact. The commissions of a broker for the sale of real estate, are due when he had found a purchaser who buys the property, and his right to such commission is not affected by a modification or change of the terms of payment or purchase price, made between the buyer and seller, different from the price or terms first given by the seller to the broker."

Under the influence of these instructions the jury were warranted, even compelled, to hold the appellant liable to pay the appellee commissions at the rate of \$2 per acre for each acre of land sold, if it appeared from the evidence, as it undisputably did, that the appellee assisted in bringing the appellant and Hersberger together, started negotiations between them, and that as a result the appellant sold his farm to Hersberger at any price.

The contract made the appellant liable to compensate the appellee for his efforts to bring about a sale only in case a buyer be procured who would pay more than \$60 per acre, in which event appellee became entitled to the excess received above that sum. The second and third instructions apply to the case the rules of law applicable to the liability of a land owner who places his property in the hands of agents to be sold without any contract as to the commissions or compensation to be paid. The fifth applies the rule that governs the liability of such land owner when he employs

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an agent to sell for him, and agrees to pay him unconditionally, a commission if a sale is effected.

Neither of them have reference to a case where the agent acts under a special contract, as did the appellee in the case at bar.

Under the law as declared by these instructions it was wholly immaterial for the jury to consider whether or not the appellee procured a purchaser who was willing to pay more than \$60 per acre for the land. Yet upon the determination of that question of fact rested the sole right of the appellee to recover the judgment that was rendered in his favor.

Because of the misdirection of the jury by the instructions the judgment is reversed and the cause remanded.

The City of Paris v. Anna Morrell.

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105	558

1. **NEW TRIALS**—*Newly Discovered Evidence*.—It is a general principle that to warrant a court in setting aside a verdict and reopening litigation for newly discovered evidence, it must be such as ought to produce on another trial an opposite result on the merits.

Memorandum.—Case for personal injuries. Appeal from the Circuit Court of Edgar County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

J. W. HOWELL, attorney for appellant.

DYAS & VAN DYKE, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

In this, an action on the case, the appellee, upon the verdict of a jury, recovered a judgment against the appellant city in the sum of \$300 as damages for injuries to her foot

and ankle, occasioned by stepping into an open ditch excavated by the city in one of its streets. The city entered its motion for a new trial, the only ground assigned being that since the trial new evidence had been discovered material to the rights of the city. It appeared in the evidence submitted to the jury, that the appellee, in company with Mrs. Jennie Johnson, ate supper in "Whalen's" restaurant, in the city of Paris, but a few minutes before she received the injuries complained of, and that in company with her husband she returned to the same restaurant within a short time thereafter — perhaps ten or fifteen minutes after — she had received the hurt or injury to her foot. The newly discovered testimony, as disclosed in the affidavit filed in support of the motion for a new trial, is to the effect that the appellee came into the restaurant twice on the evening in question; the first time accompanied by Mrs. Johnson, and afterward accompanied by her husband; and that she was lame in her ankle or foot, and put off her shoe while in the restaurant, and after replacing it, limped as she walked, on the occasion of her visit to the restaurant with Mrs. Johnson, which was before the appellee claims that she received the injury to her foot and ankle by stepping into the ditch. Upon the trial the appellee testified that after she received the injury, while at the restaurant with her husband, her foot pained her, and that she unbuttoned her shoe, etc. Mrs. Johnson testified that she did not notice that the appellee was lame or limped as she walked while they were at the restaurant together, but that she did limp after she returned with her husband. Three physicians testified to the jury that they rendered professional service to the appellee on the occasion in question, and each expressed the opinion that the ligaments or tendons that knit or hold together her ankle joint, had been lacerated or torn, and that her injuries were such as would probably result from stepping or falling into a ditch. Had the newly discovered evidence been produced upon the hearing, its only tendency would have been to show that the appellee's foot or ankle had been injured before she claimed to have stepped into the ditch. In opposition to it would have

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been the testimony of the appellee, Mrs. Johnson, and that of the physicians. All conflict in such testimony would revert to the single point whether the indications of pain and lameness exhibited by the appellee while in the restaurant were when she was there upon the first occasion with Mrs. Johnson, or when there a few minutes afterward in company with her husband. We have no doubt but that a jury would harmonize the conflict in such testimony upon the theory that all the witnesses were honest and truthful, but that those who testified as to the occurrences in the restaurant in opposition to the testimony produced in behalf of the appellee, were mistaken, not as to what really occurred there, but as to the time or occasion thereof. It is a general principle that to warrant the court in setting aside a verdict and reopening litigation, the newly discovered evidence must be such as ought to produce on another trial an opposite result on the merits. 18 Amer. and Eng. Ency. of Law, page 564, and many authorities cited in note 3; *Kendall v. Limberg*, 69 Ill. 355; *Thompson on Trials*, Vol. 2, Sec. 2762.

As we have before said, we think a jury would harmonize the newly discovered testimony, if submitted to them, with that produced upon the trial, without in any manner or degree impugning the truthfulness of the witnesses, or leading the minds of the jury to a different conclusion; nor does it seem to us that the newly discovered testimony, considered in connection with the testimony presented in behalf of the appellee, ought to produce a result different from that attained by the verdict and judgment sought to be reversed. No objection was made in the Circuit Court that the evidence did not support the allegations of the declaration, and that there was a variance in that respect, or that the evidence was not sufficient to support the verdict, nor was any ruling of the court as to either of these points preserved for review by an appellate court. Such complaints can not be made known for the first time in this court. We have, however, examined the testimony and the rulings of the court with care, and think neither objection tenable. The judgment must be and is affirmed.

52	124
56	593

**Robert C. Wilson and Lemuel D. Lane, Partners, etc.,
v. William A. Kelly.**

1. INSTRUCTIONS—*Insurers Against Carelessness.*—In an action to recover damages for personal injuries it is error to instruct the jury that no degree of care on the part of defendant will exonerate him from liability for an injury actually caused by a defect in his machinery. Such an instruction makes the defendant an insurer even against the carelessness of the plaintiff, however gross, the willful acts of strangers in causing a defect, or in what the law terms the act of God.

Memorandum.—Case, for personal injuries. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

S. G. WILSON and SALMANS & DEAPER, attorneys for appellants.

LAWRENCE & LAWRENCE, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Case for personal injury brought by appellee, who recovered judgment below on a verdict of \$2,000, which the court refused to set aside.

Appellants were grain dealers at Henning, where they had an elevator with several dumps, at one of which appellee received the injury and damage sued for. As well as we can understand from the description given by the witnesses, it consisted of a door in an elevated platform, resting at one end on a beam to which it was fastened by a trigger, and could be let down at that end. On the other side of the beam was a trap through which the grain was dumped from the wagon by letting down the hind wheels upon the door. The operation was to back the wagon upon the dump, pull up the trap, knock or push the trigger off, letting down the dump with the hind wheels upon it, when

the grain would slide out of the box and through the trap. Appellee was hauling grain for his uncle to the elevator and had been so employed for eight days, when, on January 20, 1892, in attempting so to dump a load of corn, he claimed that the trigger, through some defect, slipped off prematurely, and he was knocked upon the falling door by the wagon, which fell upon him. He was standing at the time at the rear corner of the wagon-box, had raised the trap by an iron bar on it arranged for that purpose, and was about to move the trigger when it slipped. Only a few minutes before he had so dumped his own load, knocking off the trigger with a crow-bar, driven off and hitched his team, and hurried back to dump the load of another man who was hauling for the same party.

He testified that the reason the trigger flew off was because it was "kind o' beveled off." His uncle, who examined it shortly after the accident, said the oak board where the trigger comes over it, was warped a very little, and he thought, from what he saw, that the trigger or spring was too weak to hold itself. Jacob Snelly, who fixed the dump the day after the accident and was called as a witness by plaintiff, testified that "the wood was all right where the spring was;" that the spring was not particularly weak, but got loose; that it was fastened with screws; that it was screwed up before as tight as it could be without any belting under it, but holds whenever you spring it; that they put a piece of belting in it and then ran a tap against it, and he thought they so made it a little tighter, and that was all they did.

Several witnesses testified, not very harmoniously, to admissions by appellant Lane, at appellee's room the day after the accident, that the dump had been out of order for some time; that they had had several accidents there; that it was their duty to keep a man at the dump to look after it, and hereafter they would keep one.

On the part of the defense Lane positively denied making these admissions or any of them. It was also denied and not proved that any accident had previously occurred there

or that the trigger had ever slipped before. The evidence tended to show that the dumps were put in new from the manufactory at Decatur in the spring before this accident, and first used in August or July, and that they were of the best kind and in the most common use. The agent from the manufacturer at Decatur, an expert, was there when it was put in place and said it was put in right. Appellant Wilson said he did most of the dumping; that "they didn't aim for the men that do the hauling to dump;" that he examined the trigger every few days, and this one just a day or two before the accident; that the board was not warped and the iron was perfectly level with the floor, and that there was snow dropping from the wagons on the dumps, making it slippery where the two irons came together.

Each of the appellants testified that he had no knowledge or notice of any defect whatever in the dump or trigger, and appellee said it had not slipped at any time before and was supposed to be solid.

Further evidence, not necessary to be stated, showed a decided conflict upon the questions of care or negligence on each side, the actual condition of the dump and trigger at the time, and the real cause of the accident.

Upon this state of the proof defendants asked, among others, the following instruction:

"You are instructed that it is incumbent on the plaintiff in this case, before he is entitled to recover, to establish by a preponderance of evidence that the dump of defendants in question was not at the time of the injury in a reasonably safe and proper condition for use, and that the defendants knew that it was not in a safe condition, or that it had been in a bad condition and repair so long that by reasonable care and diligence they should have known it; and unless the preponderance shows this state of facts, your verdict should be for the defendant."

This the court refused, but gave for the plaintiff the following: "3. It is not sufficient in this case to excuse the defendants from liability that they may have purchased and caused to be put in place dumps as good as known to the

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trade or business of operating elevators, if it appears from a preponderance of the evidence that the same were not kept in a safe condition so as to avoid injury; and if you believe from a preponderance of the evidence that the dump in question was defective and by reason thereof the alleged injury resulted, then the plaintiff is entitled to recover, provided that the preponderance of the evidence shows that he was in the exercise of due care on his part to avoid the said injury."

The first given for plaintiff is to the same effect, upon the hypothesis that "persons hauling grain to said elevator were allowed to drive their teams and loaded wagons upon said dump and to operate the same for the unloading and dumping of grain so hauled."

According to these instructions for the plaintiff, no degree of care on the part of defendants would exonerate them from liability for injury actually caused by a defect in their machinery. They are made insurers, even against the carelessness of the plaintiff, however gross, the willful acts of strangers in causing the defect, or what the law terms the act of God. If wrong they are not cured by the brief instruction given on the other side, that "the law does not impose upon the defendants the duty of keeping their machinery in an absolutely safe condition, but only in a reasonably safe condition."

Counsel for appellee suggest that the court's view of the fact was that the dump was put in for the sole use and benefit of appellants, and that appellee was invited by them to use it for their convenience. They claim that such was a correct view, and that it justified the instructions given as to the law. We do not think the evidence warranted it, nor if it did, that the law was correctly stated.

Whatever might be said of such dumps in general, it was proved in this case that appellant Wilson, the senior member of defendant's firm, on the day before the accident told the plaintiff and his fellow-workman, whose load he was attempting to dump, not to dump the corn they were hauling, but to scoop it over the sides of the wagon box, because

they were hauling white corn, and the bin into which that dumped contained mixed corn. They objected to scooping, and in the afternoon pressed appellant Lane to allow them to dump it. Appellee himself testified that Lane "finally told them that when his partner, Wilson, was not around they might sneak their loads into the bin with the mixed corn, but when Wilson was around they would have to scoop it." Plaintiff did not see Wilson about the elevator before he dumped his own load, but did before he attempted to dump the other, and proceeded hurriedly in order to avoid his interference; and the jury might have considered whether his haste had anything to do with the accident, if they had been properly instructed. Thus it was proved by the testimony of the plaintiff that he was not invited to use the dump, and for the convenience of the defendants, on this occasion. He was forbidden by Wilson, but at his own special request and to save his own labor was allowed by Lane to do so upon a condition which he disregarded.

We think the case was close enough, upon every material question of fact involved, to make accuracy and clearness in the instructions a matter of unusual importance, and that in giving the first and third for plaintiff and refusing the one quoted, as asked for the defendants, there was error enough to require the reversal of the judgment. Reversed and remanded.

**Frederick M. Grant et al., Trustees of Olive Branch
Lodge No. 15, I. O. O. F., v. Samuel A.
Langstaff.**

1. **BENEFICIARY SOCIETIES—Application for Benefits—Compliance with By-Laws.**—A member of a beneficiary society applying for benefits under its rules and regulations must follow the procedure prescribed by the laws and rules of the order, and he can not, until he has exhausted the remedies provided in such cases for an adjustment of such claims within the order, invoke the aid of a court of law.

Memorandum.—Assumpsit for sick benefits, etc. Appeal from the City Court of Canton, Fulton County; the Hon. JEFFERSON ORR, Circuit

Grant v. Langstaff.

Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 12, 1898.

The opinion states the case.

APPELLANTS' BRIEF, GREENE & HUMPHREY, ATTORNEYS.

Appellants contended that a member of a fraternal society is bound to exhaust the remedies provided within the tribunals of the order before he can resort to the civil courts.

All the contracts of an incorporated benefit society are made with reference to all the laws of the organization. These are deemed part of each contract of membership, whether mentioned or not, and are as binding upon all the members as provisions contained in the charter.

Each member is conclusively presumed to know them, and will not be heard to plead ignorance of their provisions in any case. 16 Am. and Eng. Ency. of Law, 40, 41.

The payment of sick benefits is a common feature of benefit societies, and they are oftener provided for in the by-laws than in the certificates of membership. Especially does the last remark apply to the great fraternal bodies, including grand and subordinate lodges. In all cases which have arisen involving these benefits, it has been held that the laws of the society are to be considered in determining the right, and they are to govern, unless contrary to municipal law. 16 Am. and Eng. Ency. of Law, 43; Morawetz on Private Corporations, Sec. 493; Bacon on Benefit Societies, Secs. 91, 94; Bliss on Insurance, Sec. 426; May on Insurance, Sec. 552; Niblack on Mutual Benefit Societies, 130, 131; Oliver et al. v. Hopkins et al., 144 Mass. 175; Otto v. Journeyman Tailors' Protective and Benevolent Union, 7 Am. St. Rep. 165, note; Chamberlain v. Lincoln, 129 Mass. 70; Karcher v. Supreme Lodge Knights of Honor, 137 Id. 368, 372; Lafond v. Deems, 81 N. Y. 507; 8 Abb. N. C. 344; White v. Brownell, 2 Daly, 329, 365; 4 Abb. Pr., N. S. 162, 199; Poultney v. Bachman, 31 Hun 49; McAlees v. Supreme Sitting Order of Iron Hall (Pa.), 13 Atl. Rep. 755; McCallion v. Hibernia Savings and Loan Society, 70 Cal. 163; Anacosta Tribe No. 12 v. Murbach, 13 Maryland 91; 71 Am. Dec. 626; Dolan v.

Court Good Samaritan, 123 Mass. 437; Grosvener v. United Society of Believers, 118 Mass. 90; State v. Williams, 75 N. C. 134; Hyde v. Woods, 2 Saw. 659; Venable v. Baptist Church, 25 Kan. 177; Harrison v. Hagle, 24 Ohio St. 254; Andrew McCabe v. Father Matthew Total Abstinence Beneficial Society, 24 Hun 151; Tribe of Red Men v. Schmidt, 57 Md. 98; Harrington v. Workingmen's Benevolent Association, 70 Ga. 340; McDowell v. Ackley, 93 Pa. St. 277; Leech v. Harris, 2 Brewster 571; Toram v. The Howard Beneficial Society, 4 Pa. St. 517; Fischer v. Raab, 57 How. 87; Olery v. Brown, 51 How. Pr. 92; Robinson v. Irish Am. Ben. Soc., 67 Cal. 135; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. St. 411; Walsh v. Ætna, 30 Ia. 145; Treadway v. Hamilton Mut. Ins. Co., 29 Conn. 168; Fritz v. Muck, 62 How. Pr. 74; People ex rel. v. Board of Trade, 80 Ill. 134; High Court of Foresters v. Zak, 35 App. 615; Blumenfeldt v. Kirschuck et al., 43 Ill. App. 435; Bauer v. Samson K. P., 102 Ind. 270; Supreme Council v. Garrigus, 104 Ind. 133; Supreme Council Chosen Friends v. Forsinger (Ind.), 25 N. E. Rep. 129.

APPELLEE'S BRIEF, D. ABBOTT AND G. L. MILLER,
ATTORNEYS.

Parties can not bind themselves in advance of a controversy that may arise upon property rights, that such controversy shall be settled or adjudicated by an individual or corporation. Home Ins. Co. v. Morse, 20 Wallace, 445; Kistler v. Indianapolis, etc., Co., 88 Ind. 460; Ments v. Armenia F. Ins. Co., 79 Pa. St. 478; Wood v. Humphrey, 114 Mass. 185; Bauer v. Sampson L. K. of P. (Ind.), 1 N. E. 575; Sup. Council O. of Ch. F. v. Forsinger (Ind.), 25 N. E. 129.

An agreement by a member of a lodge, or a provision in the by-laws or constitution of such lodge to the effect that such member shall not commence proceedings in a court of law (civil courts) for money demands due him from the lodge, are invalid and not binding, as being in their nature to oust the civil courts of the land of their jurisdiction, and against public policy. Home Ins. Co. v. Morse, 20 Wallace

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445; *Bauer v. Sampson Lodge*, K. of P., 1 N. E. (Ind.) 571; *Nute v. Ins. Co.*, 6 Gray, 174; *Cobb v. Ins. Co.*, 6 Gray, 174; *Hobbs v. Ins. Co.*, 56 Me. 421; *Stephenson v. Ins. Co.*, 54 Me. 70; *Sup. Council O. of Ch. F. v. Garrigus*, 3 N. E. Rep. 818; *Sup. Council O. of Ch. F. v. Forsinger*, 25 N. E. Rep. 129; *Bacon on Benefit Societies*, Sec. 450.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought against the appellants as trustees of Olive Branch Lodge, No. 15, Independent Order of Odd Fellows, by the appellee, Langstaff, a member of the Scarlet degree of said lodge. The laws of the order provide for the payment of the sum of five dollars per week, under certain conditions, to those of its members of the Scarlet degree who are sick and disabled. The appellee claimed to be entitled to receive, and that the lodge was liable to pay to him, under its rules, regulations and by-laws, a large sum of money as such sick benefits. He notified the proper authorities of the appellant lodge of his claim and brought certain of his demands, in compliance with the rules and regulations of the order, before the lodge for adjustment and settlement. Weekly benefits were allowed and paid for a number of weeks, but his claims for like benefits for quite a period of time were denied and disallowed by the lodge. He brought this action to recover the "sick benefits" thus refused to be paid and for other like demands not presented to the lodge. The appellant's trustees filed a number of pleas, in substance the same—the averments in effect being that Olive Branch Lodge is a subordinate lodge of the Grand Lodge of the Independent Order of Odd Fellows of the State of Illinois, and that the constitution and by-laws of the order provide that, if a member of the order claimed to be entitled to "sick benefits," he should present his claims to the subordinate lodge of which he was a member, for adjustment, and if he felt aggrieved by the decision of the subordinate lodge refusing and disallowing the claim, an appeal from such decision to the Grand Lodge should be allowed such member, provided

such appeal be taken within three months from the rendition of the decision, and that the appellee did, in pursuance of such provisions of the laws of the order, present certain of his demands to the appellant lodge, and that it decided that he was not entitled to receive payment thereof from the funds of the order; that he did not appeal, and that the other demands for such benefits sought to be recovered by this action were not presented to or brought before the subordinate lodge for adjustment or action thereon. A demurrer was interposed to such pleas and the same sustained by the court, to which ruling the appellants excepted. Judgment was rendered against the appellant trustees, who prosecute this appeal to this court.

Two questions are presented by the record.

1st. Was the appellee, after having presented his claim to the subordinate lodge, required to appeal to the Grand Lodge from an adverse decision, or might he abandon further effort within the order and institute an action in the courts of law to recover his demand.

2d. Can a member of a subordinate lodge, claiming "sick benefits" from the funds of the order, omit application to the subordinate lodge therefor and institute suit at law against the lodge for such benefits.

It can not be denied but that there is some conflict of authority upon these questions, but upon careful examination and consideration of such authorities and of the reasoning and principles upon which they proceed, we are of opinion that the better rule is that a member of this order in applying for benefits under its rules and regulations, must follow the procedure prescribed by the laws and rules of the order, and that he can not, until he has exhausted the remedies provided in such cases for an adjustment of such claims within the order, invoke the aid of courts of law. This view of the law is supported by Bacon on Benefit Societies, Sec. 94; Niblack on Mutual Benefit Societies, Sec. 130-131; *Oliver et al. v. Hopkins et al.*, 144 Mass. 175, and many cases collected and commented upon in note to *Otto v. Journeyman Tailors' Union*, 7 Amer. Stat. Rep. 165. The principle

announced finds support in the reasoning of the Supreme Court of our State in *The People ex rel. v. Board of Trade*, 80 Ill. 134.

It follows that the trial court in passing upon the sufficiency of the pleas erred in so far as it ruled that the appellee might seek the aid of the courts of law, before exhausting the remedies provided by the regulations of the order for an adjustment of his alleged demands upon the funds of the society of which he was a member. For this error the judgment is reversed and the cause remanded.

Warren Lawrence, Administrator of the Estate of William D. Lawrence, Deceased, v. John A. Coddington.

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110	325

1. *CONTRACTS—Compromise of Claims Sufficient Consideration.*—A compromise of doubtful and conflicting claims is a sufficient consideration for a promise voluntarily made and not induced by fraud, and it is not material to determine whether such claim was legal or otherwise.

Memorandum.—*Assumpsit.* Appeal from the Circuit Court of Mason County: the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

APPELLANT'S BRIEF, H. W. MASTERS, ATTORNEY.

An agreement is void as against public policy, which provides that one who is bound to give his best judgment upon a question in which parties adversely interested are concerned, and who is not the agent of either, shall be paid for his services in proportion to the amount recovered by one from the other. *Thomas v. Caulkett*, 57 Mich. 392.

A promise to pay for services to be rendered in procuring a wife for one, is void. *Johnson v. Hunt*, 81 Ky. 321.

A contract for the sale of domestic sardines, to be put up with labels representing the sardines as foreign, is against public policy. *Materne v. Horwitz*, 101 N. Y. 469.

An agreement whose object is to induce any officer of the State to act partially or corruptly, is void, and any agreement which has a tendency that way is void. *Lucas v. Allen*, 80 Ky. 681; *O'Hara v. Carpenter*, 23 Mich. 410; *Caton v. Stewart*, 76 N. C. 357.

It is held that agreements for pay, to procure by personal influence contracts from the government, or with a foreign country, are against public policy, and void. *Tool Co. v. Norris*, 2 Wall. (U. S.) 45.

An agreement contemplating the use of underhand means to influence legislation is void. *Mills v. Mills*, 40 N. Y. 543; *Frost v. Belmont*, 6 Allen (Mass.) 152.

A promise to pay for services rendered in canvassing for election to an office, is held to be void. *Keating v. Hyde*, 23 Mo. App. 555.

A contract to abandon the prosecution of proceedings for the establishment of a public highway, for a money consideration, is void. *Jacobs v. Tobiason*, 65 Iowa 245; *Gray v. McReynolds*, 65 Iowa 461.

If the party knows or ought to know that he has no claim, there can be no consideration for a promise to pay. *Pitkin v. Noyes*, 47 N. H. 294; *McKinley v. Watkins*, 13 Ill. 140; *Headley v. Hockley*, 50 Mich. 43; *Ormsbee v. Howe*, 54 Vt. 182; *Feeter v. Weber*, 78 N. Y. 334.

A promise not to prosecute a demand which has no existence in law or fact is no consideration. *Mulholland v. Bartlett*, 74 Ill. 58; *Cline v. Templeton*, 78 Ky. 550; *Kidder v. Blake*, 45 N. H. 530; *Long v. Towl*, 42 Mo. 545; *Gunning v. Royal*, 59 Miss. 45.

APPELLEE'S BRIEF, WALLACE & LACEY, ATTORNEYS.

An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterward comes out that the right was on the other side, shall be binding and the right shall not prevail against the agreement of the parties; for the right must always be on the one side or the other, and therefore a compromise of a doubtful right is a sufficient foundation of an agreement. *Stapelton v. Stapelton*, 1

Lawrence v. Coddington.

Atkyns, 12, cited with approval in Honeyman v. Jarvis, 79 Ill. 318.

The waiver of any legal right, although it may be founded upon a tort, at the request of another, has always been deemed a sufficient consideration for a promise. Miller v. Hawkes, 66 Ill. 185.

Forbearance to file a *bona fide*, though invalid, claim, is a good consideration for a promise. Hewitt v. Curry, 63 Wis. 386.

A compromise of a disputed claim or the discontinuance of a suit already brought may uphold a promise, although the demand was unfounded. Bank v. Geary, 5 Pet. (U. S.) 98.

It has long been a settled principle that a voluntary compromise or settlement of doubtful and conflicting claims will not be set aside or disturbed in the courts merely because the parties may have acted under a mistake as to law. It rests on the sound basis that there can be no certainty or security in affairs unless every person is supposed to know the law, and that to overhaul a settlement of doubtful and conflicting claims, voluntarily made, with full knowledge of the facts, on the ground of misapprehension of the law, would open the door to endless litigation. Stron v. Mitchell, 45 Ill. 213.

The waiver of any legal right is a sufficient consideration. Vogel v. Meyer, 23 Mo. App. 427; Conrad v. La Rue, 52 Mich. 83; Robertson v. March, 3 Scam. 198; Roberts v. Cobb, 103 N. Y. 600; Palton v. Hassinger, 69 Penn. 311.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment against appellant as administrator, upon the promise of the deceased to pay the appellee the sum of \$250 for the alleged consideration of dismissing certain legal proceedings, and to settle all further litigation between the parties in regard to the subject-matter in dispute.

The sole question is as to the validity of the consideration for the promise.

Sarah Alwood was the owner of 640 acres of land which she conveyed to her sister, Esther Phillips. The latter afterward died, leaving a will, by which she devised a part of this land to Wm. D. Lawrence, the appellant's intestate. The appellee, who was a relative of these sisters, caused proceedings to be instituted to appoint a conservator for Miss Alwood, on the ground of her alleged mental incapacity to manage her business affairs, and was threatening to attack the conveyance made by her to her sister. He also claimed that these women were each indebted to him for services rendered in taking care of them and in looking after their affairs. To procure a dismissal of the proceedings commenced and of those threatened, and thus to settle further litigation which might result in depriving him of the land devised to him by the will of Esther Phillips, Lawrence promised to pay appellee the sum herein recovered. As a relative of Sarah Alwood, the appellee had a right to institute the proceedings for a conservator. If he was also her creditor, he had a right in that capacity. As a near relative he had a strong incentive to set aside the conveyance to Mrs. Phillips if it could be done.

When he waived these rights and agreed to make no further trouble and to interfere no further with the position of Lawrence as a devisee, he did nothing contrary to public policy. It may be assumed that he acted in good faith and was not guilty of a mere pretense to extort money from the devisee.

It is not material to determine whether there was a valid legal claim, for a compromise of doubtful and conflicting claims is a sufficient consideration for a promise voluntarily made and not induced by fraud. We find no occasion to interfere, and the judgment will be affirmed.

**Adam Ross and Addison F. Helms v. James H. Walker
& Co., The Irwin Phillips Co. and Cook,
Lyman & Selxas.**

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160 50

1. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*The Term Defined.***—A written deed of conveyance, executed by the assignor, as party of the first part, to the assignee, as party of the second part, reciting the grantor's indebtedness and inability to pay, and conveying his property, real and personal, by apt words of sale and transfer, to the assignee, in trust, to take possession of and sell the same, and to collect the outstanding debts, and out of the proceeds to pay the creditors.

2. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Requisites of.***—There must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned, in trust for the benefit of creditors; and hence an absolute conveyance made directly to the creditor in payment, or any form of lien so given as security for the payment of a *bona fide* debt, though having the effect to give him a preference, is not an assignment for the benefit of creditors within the meaning of the statute.

3. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*What Instruments in Connection Therewith Void.***—Where an instrument disposing of property has been held void under the act relating to assignments, etc., it has been upon the ground that, having been made in contemplation of an assignment, afterward actually executed, they were to be deemed a part of it.

4. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*What Transfers Are Not.***—A debtor, solvent or insolvent, notwithstanding the statute, may lawfully transfer any part or the whole of his property, absolutely, in payment, or incur it by mortgage, deed of trust in the nature of a mortgage, judgment confessed or pledge, as security for the payment of any one or more of his debts.

5. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Chattel Mortgages, When Not.***—A merchant in failing circumstances executed two chattel mortgages upon his stock of goods to secure two of his creditors and assigned the books of accounts and notes to certain other creditors to secure them, thus disposing of all his property not exempt by law from execution; *it was held* that the transfer did not amount to an assignment for the benefit of creditors under the statute.

6. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Right of a Debtor to Dispose of His Property, etc.***—Instruments transferring the property of a person in failing circumstances do not of themselves, even in effect, constitute an assignment. When not made in view of an actual assignment following, such transfers can not be regarded as a fraudulent evasion of the statute, because the debtor, though intending to appropriate all his

property to the payment of his debts, is not bound to make an assignment. In so appropriating it by absolute conveyances or mortgages directly to the creditors therein named, not creating a trust, he exercises a clear legal right, and may thus distribute it as he sees fit. His right by such means to prefer some creditors to others is not affected by the statute.

Memorandum.—Voluntary assignments. Appeal from an order of the County Court of Hancock County; the Hon. JOHN E. MILLER, County Judge, presiding. Heard in this court at the May term, 1898, and reversed. Opinion filed November 27, 1898.

The opinion states the case.

APPELLANT'S BRIEF, SHARP & BERRY BROS., ATTORNEYS.

It is not the form, but the effect of an instrument, which is to be considered in determining whether or not it is an assignment. *Watson v. Bayley*, 12 Pa. St. 164.

A lease has been held to constitute an assignment. Same authority.

A power of attorney. *Lucas v. Sunbury & Erie R. R. Co.*, 32 Pa. St. 458.

A bond and mortgage. *Owen v. Arvis*, 26 N. J. Law, 22; *First National Bank v. Knowles*, 67 Wis. 373.

Chattel mortgages. *Winner v. Hoyt*, 66 Wis. 227.

A chattel mortgage and bill of sale. *Burrows v. Heldorff*, 8 Iowa 103; *Vanpatten v. Burr*, 52 Iowa 518.

Any form of instrument or instruments by which an insolvent debtor disposes of his entire property not exempt, or even substantially all, for the benefit of certain creditors, with preferences, is in legal effect an assignment for the benefit of all creditors. *Friend v. Yagerman*, 26 Fed. Rep. 814; *Martin v. Houseman*, 14 Fed. Rep. 160; *Kelley v. Richardson*, 21 Fed. Rep. 70; *Tichmyer v. Baum*, 43 Fed. Rep. 719.

J. W. MARSH and W. N. GROVER, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a petition to the County Court by appellees, creditors of appellant Ross, to have two chattel mortgages

given by him to certain other creditors therein respectively named, upon his stock of goods in store at Warsaw, declared to be a general assignment under the statute, and appellant Helms required to give bond, as assignee, to administer the property in accordance with the orders of the court.

Appellants answered severally, replications were filed and evidence heard. Whereupon appellant Ross moved the court to dismiss the case as to him, which was denied, and an order entered substantially according to the prayer of the petition, and a motion by each of the appellants for a rehearing overruled. They then took this appeal.

For quite a number of years prior, and until the 13th of August, 1892, appellant Ross was a dry goods merchant at Warsaw. Having become embarrassed and being pressed for payment and threatened with suits, on that day he went to Chicago to consult some business friends and creditors upon the situation stated, and upon their advice executed a chattel mortgage upon his entire stock to certain creditors therein named to secure an aggregate indebtedness due them of \$8,145.13, setting forth the amount due to each respectively, and delivered it to Robert R. Baldwin, an attorney of the John V. Farwell Co., one of the mortgagees.

On the same day he made and signed a second mortgage upon the same stock to certain other creditors therein named, including the appellees, to secure an aggregate indebtedness to them of \$3,495.79, setting forth the amount due to each, respectively, but did not deliver it until the 15th.

These instruments were in the usual form of chattel mortgages, with the usual defeasance clauses, and gave to the mortgagees power to sell at public or private sale, and for cash or on credit, as they should think best, and in addition thereto contained the following: "The said mortgagor hereby authorizes the sheriff of the said county of Hancock to execute the power of sale in this mortgage granted to the mortgagees or their assigns or legal representatives, and all other powers to them or either of them granted or given by this mortgage."

And the second was therein expressly declared to be subject to the first.

The following evening (August 14th) appellant Ross left Chicago on his return to Warsaw, accompanied by Mr. Baldwin, who had the first mortgage and was acting for and under the direction of the John V. Farwell Co., and had telegraphed to have appellant Helms, then sheriff of Hancock county, meet him there on his arrival.

They arrived shortly before noon of the 15th, and went to the store. After Ross had gone to his dinner, Baldwin obtained the keys from the clerks and took possession. He then turned them over to the sheriff with the mortgage, directing him to take care of the stock and to sell as provided in the mortgage, referring him to Mr. Grover, as the attorney of the company, if he should need any advice. When Ross, on his return, found the sheriff in possession, he acknowledged the second mortgage and delivered it to the magistrate for the mortgagees, to be recorded; and then assigned his notes and book accounts, which were of small value, to still other creditors—Mrs. Miller and Mrs. Geitz—to pay *bona fide* debts then due and owing from him to them.

Thus he disposed of all the property he had that was not exempt by law from execution.

On the 16th an expert from the house of the Farwell Company, assisted by Ross and his clerks, took an invoice of the goods mortgaged, making it amount to over \$13,000, which exceeded the sum of his indebtedness.

Under the direction of the first mortgagees, the sheriff, on the 18th, duly advertised the stock for sale at public auction on the 29th, and in pursuance thereof sold it for \$7,166.49, which he now holds subject to the decision of this case.

Both of the mortgages were dated August 15, 1892. The first was recorded on the 23d and the second on the 16th of said month.

It further appears that the Farwell Company acted solely for the first mortgagees; that Baldwin acted solely for the

Farwell Company; that neither had any interest in or connection with the second mortgage or the assignment of the notes and book accounts; that the sheriff acted for and under the direction of the first mortgagees; that when Ross left Chicago he did not know what Baldwin intended to do; but was informed by him before they arrived at Warsaw, that he supposed his stock would pay his indebtedness in full, and did not intend to make an assignment for the benefit of his creditors, under the statute, but did intend that in case of its deficiency the first mortgagees should be preferred.

There is no serious dispute as to what appellant Ross in fact did, and intended to do. His answer admits nearly all of the averments in the petition. The question is whether these acts and intentions amounted in legal effect to an assignment for the benefit of his creditors, within the meaning of Ch. 10a, R. S. 1891. The County Court held that they did; that that court therefore had jurisdiction of the matter and that the preferences attempted to be given were void (Sec. 13) and accordingly ordered that appellant Helms give bond as assignee, and proceed in the distribution of the moneys in his hands, the proceeds of said sale, under the further direction of the court.

Whether this holding was proper depends upon the true construction of the statute. In quite a number of cases the Supreme Court has given it a construction applicable to the conceded facts shown by this record. Without presuming to vindicate that construction, or quoting *in extenso* from the opinions in these cases, we shall refer to them only far enough to warrant, in our opinion, the conclusion that it is in conflict with that of the County Court given in this case.

First, as to what constitutes an assignment within the meaning of the act. In *Weber v. Mick*, 131 Ill. 533, the court approved and adopted the definition in *Burrill on Assignments*, sections 2 and 3—a transfer, without compulsion of law, by a debtor, of some or all of his property to an assignee or assignees, in trust to apply the same or the proceeds thereof to the payment of some or all of his debts and

to return the surplus, if any, to the debtor. It implies a trust, and contemplates the intervention of a trustee, and assignments to creditors directly and not upon trust are not such.

In *Schroeder v. Walsh*, 120 Ill. 403, it was said: "Notwithstanding that statute, a debtor may pay one creditor in full, either in money or by the sale of his property. That act applies only to conveyance of property to an assignee or trustee, in trust, to convert the same into money for the benefit of creditors of the assignor."

In *Farwell v. Wilson*, 133 Ill. at p. 49, the court outlines such an assignment as "it has always been understood in this State"—being "a written deed of conveyance, executed by the assignor, as party of the first part, to the assignee, as party of the second part, reciting the grantor's indebtedness and inability to pay, and conveying his property, real and personal, by apt words of sale and transfer, to the assignee, in trust to take possession of and sell the same, and to collect the outstanding debts, and out of the proceeds to pay the creditors"—and holds that it was preferences in instruments such as are above described that the legislature intended to prohibit. The mere form of the instrument is, no doubt, immaterial, provided the operation of it is to create a trust in the property conveyed, for the benefit of creditors. It must be an actual trust, created by operation of the instrument itself. The court has repeatedly said that the statute contemplates no such thing as a constructive trust.

These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned, in trust for the benefit of creditors; and hence that absolute conveyances made directly to the creditor in payment, or any form of lien so given as security for the payment of a *bona fide* debt, though having the effect to give him a preference, is not an assignment for the benefit of creditors within the meaning of the statute. Wherever such instruments have been held void under Sec. 13, it has been upon the ground that, having been made in

contemplation of an assignment in trust afterward actually executed, they were to be deemed a part of it. Preston v. Spalding, 120 Ill. 208; Young v. Clapp, N. E. Rep., Vol. 32, p. 187. Otherwise a debtor, solvent or insolvent, notwithstanding the statute, may lawfully transfer any part or the whole of his property, absolutely, in payment, or incur it by mortgage, deed of trust in the nature of a mortgage, judgment confessed, or pledge, as security for the payment of such debts preferred. First Nat. Bank of Chicago v. North Wisconsin Lumber Co., 41 Ill. App. 343; Young et al. v. Clapp et al., N. E. Rep., Vol. 32, p. 187, and all the cases, *supra*.

We perceive no conflict between these cases or any of them, and that of Farwell v. Cohen, 138 Ill. 216, so much relied on by counsel for appellees, as to what is necessary to constitute an assignment for the benefit of creditors. In the latter it is defined just as in Weber v. Mick and others, and in its application to the instrument there in question, which was in the form of a bill of sale of a stock of goods from the debtor to one of his creditors, the court held that on its face it was an absolute transfer of the whole interest, legal and equitable, in the property, without any condition of defeasance, providing for its return upon payment of the debts mentioned, and was made to Cohen expressly in trust, as well for the benefit of other creditors named, with preferences. By all the tests stated in the other cases, or here sought to be applied, it must have been held an assignment within the meaning of the statute. By the same tests stated in that case and the others cited, those here in question were not. The notes and book accounts of the debtor were absolutely assigned directly to the creditors named, involving no trust, but in payment of debts not denied to have been *bona fide* due and owing by him to them. The others were also made directly to the creditors therein, respectively, named, without the intervention of any trustee or the creation of any trust for the benefit of creditors, and they were both in form and effect, chattel mortgages. They did not, in terms or effect, absolutely transfer the whole interest of the debtor,

legal and equitable, in the property. They did contain a condition of defeasance providing for its return upon payment of the debts mentioned.

From the fact that they were given to secure the payment of notes so soon to become due, and the assumption—which we do not say was unwarranted—that having thereby disposed of all his property, Ross had no hope or intention to redeem, but expected to go out of business, it is argued that the liberal construction of the statute, as being “intended mainly for the benefit of creditors of the insolvent, so as to prevent the evils and advance the remedy in view, which the court has so often declared to be proper,” would hold these instruments to be in effect an assignment in trust, within its provisions, or in fraudulent evasion of its provisions.

This would be a constructive assignment; a thing which the statute does not contemplate. The premises from which this conclusion is drawn do not change the character of the instruments. They are still but securities given to the creditor directly, and subject to the right of redemption, with no trust whatever for the benefit of creditors, but at most a trust, as to the excess, if any, for the benefit of the debtor, which the law would imply if it were not expressed. And the court say in *Farwell v. Nillson*, *supra*, that to hold such an instrument to be an assignment would not be construction, even the most liberal, but judicial legislation. In the cases cited by counsel, *Hide and Leather National Bank v. Rehm*, 126 Ill. 461, *Hanford v. Prouty*, 133 Ill. 355, and *Hier v. Kaufman*, 134 Ill. 223, the instruments in question were followed by actual assignments, and the language relied on must be considered as referring to such cases. *White v. Cotzhausen*, 129 U. S. 329, also cited, was expressly based on *Preston v. Spalding*, which was a like case. In *Moore v. Meyer*, 47 Fed. Rep. 99, this case was explained, and the Illinois cases reviewed in an elaborate opinion by Judge Allen (U. S. Circuit Court for Southern District of Illinois), and it is held as in accordance with the construction of the statute by our Supreme Court, that such instruments do

not, of themselves, even in effect, constitute an assignment. Nor, when not made in view of an actual assignment following, can it be regarded as a fraudulent evasion of the statute; because the debtor, though intending to appropriate all his property to the payment of his debts, is not bound to make an assignment. In so appropriating it by absolute conveyances, or mortgage directly to the creditors therein named, not creating a trust, he exercises a clear legal right, and may thus distribute it as he sees fit. His right by such means to prefer some creditors to others is not affected by the statute.

Appellant Ross did not intend to make an assignment for the benefit of creditors and never did make it, for the reason that he did intend to make preferences and knew he could not do so by such an instrument.

It is claimed that the authority to the sheriff of Hancock county to execute the powers given to the mortgagees made him a trustee, and the mortgages an assignment. We think not. They did not purport to give him any interest, legal or equitable, in the property. They did not appoint him to execute the powers referred to, but only authorized him to do so as far as the mortgagor was concerned. Under that authority he could do nothing with it, except by consent and under the direction of the mortgagees. They, as a body, could not take possession nor sell, but must act through some individual, and the mortgagor on his part consented that the sheriff might act for them. They could have appointed another notwithstanding the authority given him by the mortgagor.

Baldwin did in fact first take possession, and he turned it over to the sheriff as a mere minister, without title or interest. He could have done nothing in the premises in his own name or right. Nor did he affect or pretend that he could or did. He was in no sense an assignee or trustee.

For the reasons stated we are of opinion that the County Court erred in its holding and order, which will therefore be reversed.

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1. **CONTRACTS—*Recovery for Part Performance.***—Either party to a contract, whether entire or several, may recover as on an implied agreement, for a partial performance which has been voluntarily accepted by the other with full knowledge of the breach, but subject to the latter's right to recoup for the failure to fully perform the express contract.

2. **EXPRESS CONTRACTS—*Right of Recovery.***—Where a person seeks to recover damages on an express contract he must aver and prove that he is not himself in default as to the agreement for the breach of which he sues. The principle is that neither party can obtain the aid of a court to enforce in his favor a contract which, without legal excuse, he has failed to perform on his part.

Memorandum.—Assumpsit. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1898, and affirmed. Opinion filed December 20, 1898.

The opinion states the case.

APPELLANT'S BRIEF, LILLARD & WILLIAMS, ATTORNEYS.

This case is governed by a different line of decisions, holding that, where the vendor has not delivered all the goods contracted for and the vendee has not paid for all goods he has received, the damages of vendee and balance of purchase price due the vendor will be set off or recouped and a judgment rendered for vendor or vendee for the balance due the one or the other, as the case may be. Of which line of decisions, exactly applicable to this case, the following are selections, viz.: *Richards v. Shaw*, 67 Ill. 222; *Corcoran v. Lehigh Coal Co.*, 138 Ill. 390; *Evans v. C. & R. I. R. R. Co.*, 26 Ill. 189; *Ludasco Oil Co. v. Brewer*, 66 Pa. St. 351; *Scott v. Coal Co.*, 89 Pa. St. 231; *Bowker v. Hoyt*, 18 Pick. (Mass.) 555; *Booth v. Tyson*, 15 Vt. 515; *Cole v. Swanston*, 1 Cal. 53; *Stevens v. Beard*, 14 Wend. (N. Y.) 256; *Ives v. Van Epp*, 22 Wend. (N. Y.) 154; *Tipton v. Feitner*, 20 N. Y. 423; *Perlee v. Bebee*, 13 Hun (N. Y.) 89; 2 *Sutherland on Damages*, 356 and notes, and top p. 358.

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APPELLEE'S BRIEF, A. E. DE MANGE, ATTORNEY.

A vendor has a right to rescind upon the vendee's refusal to comply with the terms of the contract, save on a new condition. *Gilbert v. McGinnis*, 114 Ill. 30.

If he is in default of payment and his default has not been waived, he can not recover for loss of profits he might have made had the contract been fully performed. *Penn Coal Co. v. Ryan*, 107 Ill. 226; *Stewart v. Many*, 7 Brad. 515.

The mere fact that the seller indulges the buyer by sending him goods when the buyer is in default in his payments does not amount to a waiver of the conditions of payment fixed in the contract. *Penn. Coal Co. v. Ryan*, 107 Ill. 226.

While the buyer is in default, he has no legal right to ask that goods shall be shipped to him, or to ask for damages because they are not shipped. *Stewart v. Many*, 7 Brad. 515.

It would be singularly inequitable to hold appellee bound to ship machines to appellant while it was so refusing or neglecting to pay for those already shipped in accordance with the agreement. *Stewart v. Many*, 7 Brad. 517; *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Curtis v. Gibney*, 49 Md. 131; *McGrath v. Gregner*, January term, 1893, Md. Court of Appeals; *Chicago Legal News*, April 15, 1893.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

In this case the facts are substantially agreed on, and the question on the record is simple and purely one of law.

Appellee was an Illinois corporation engaged in the manufacture of bicycles at Chicago, and appellant also an Illinois corporation engaged in selling bicycles and other machines at Bloomington.

On December 8, 1891, the parties entered into a written contract, of which it is unnecessary to say more than that by it appellee agreed, among other things, to deliver to appellant on the cars at Chicago, 300 Moffatt Safety bicycles, of 1892 pattern, shipments to commence in January then next, and

made thereafter in quantities and at times as appellant should specify, and paid for by his acceptances at thirty days.

Appellant ordered one machine the day before the contract was made, and on the 31st of the same month, twenty-four; from time to time in February, 1892, forty-six; in March, one hundred and thirteen; in April, sixty-seven, and in May, nineteen, in all two hundred and seventy. Most of these orders were for single machines, to be shipped to different points directly to parties, respectively, to whom appellant had made sales; some for two or three; and the few for large numbers, to appellant at Bloomington.

In partial compliance with these orders appellee shipped in February, two; in March, nine; in April, nineteen; in May, fifty-six; in June, sixteen, and in July, three; in all, one hundred and five.

The evidence showed and it was admitted that appellant did not give its acceptances for all of those shipped, but from the time the first was received until this suit was brought was constantly in arrears for more or less of them. This arrearage was purposely and persistently withheld, on the ground that appellee was first in default, and that the damage to appellant by reason of the delays and shortness of shipments always exceeded it. The correspondence between the parties, which is in the record, consists largely of mutual complaints for disregard of their contract obligations. Appellant was insisting on prompt and full compliance with its orders, and appellee claiming it was doing all it could and increasing its facilities for doing more than before in that direction, and insisting on prompt and full acceptances for what were shipped. Neither justified nor attempted to excuse its own delinquency on the ground of the other's, until as hereinafter stated. As early as March 15th, appellant wrote to appellee that they were receiving countermands from their customers, because of the failure to ship machines to them as ordered, and saying, "machines we must have or sustain a loss, and you know what that means." But the first notice taken of appellee's complaint of neglect to send acceptances that we find in the correspondence abstracted

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is in appellant's letter of April 19th, in answer to appellee's of the 12th, inclosing draft, dated March 29th, for acceptance to cover shipments up to that date, for \$675.04, in which it says: "You can hardly expect us to take up the matter of your account and make settlement of it in the condition that things are now. We want some very satisfactory proof that you can take care of us during and at the close of the season if we do so."

To this letter appellee replied on the 21st, admitting that it had not been able to perform as promised in regard to shipments, but expressing surprise, for reasons stated, at the position taken by appellant, and saying: "We must insist that you let us have your acceptance by return post, and we in turn will do our best toward filling your orders."

On the 26th, appellant, reviewing the course of their dealings, wrote: "Now if you expect us to sign acceptances promptly, then you must expect to do something for us. If you do not show a disposition immediately to give us goods, and in large quantities, this letter is but a forerunner of what you will receive." To which appellee replied on the 27th: "I am in receipt of your favor of the 26th, which covers a good deal of ground that we have already gone over, and which convinces me further of the issue your company is leading up to. * * * We shall hold further shipments until we receive an acceptance or cash for all the wheels we have shipped you up to date."

Notwithstanding further acceptances, but not in full, and further orders, filled only in part and with delay, these mutual complaints and demands continued until July 18th, when appellee, by letter of that date, among other things, notified appellant that unless payment should be made for the goods shipped and not paid for and the other matters of difference arranged within five days, it would terminate appellant's agency for the sale of its wheels in the territory referred to and fill orders from such territory itself. On the 23d, appellant, in reply to one from appellee of the 21st, wrote, among other things, "We do not intend to pay you another cent until there is an adjustment of our claim

for damages;" and on the 27th brought this suit. It was in assumpsit, on four special counts upon the contract, with the common counts added. The cause of action set forth in each of the special counts was defendant's breach of the written contract by unreasonable delay in the shipment of the 105 bicycles shipped and failure to ship the other 165 ordered. The third and fourth, added by leave of the court, alleged special damages by reason of defendant's alleged knowledge that plaintiff bought to resell, and that its profits would be \$50 upon each machine resold, and that plaintiff had incurred and would incur a large expense in preparing to resell and in reselling.

Defendant pleaded the general issue, and set-off in the common counts, and two other pleas, setting off damages by failure of defendant to give acceptances, to which demurrers were sustained. But it was afterward stipulated "that all evidence that would be competent under any issue well pleaded should be considered as though the declaration or pleas or replications were filed making such issues or averments."

The cause was tried by the court without a jury. Appellant admitted that it had withheld acceptances and was in arrears for the 105 wheels actually shipped and received, to the amount of \$1,647.96, as a partial indemnity against the damages it claimed to have suffered, but showed in reduction of this sum an account of \$588.70 for repairs of defects in them. The court allowed this account and rendered judgment for the defendant for the difference, \$1,059.26, disallowing plaintiff's claim for damages. Exceptions were duly taken by plaintiff to this judgment, and from it this appeal is prosecuted.

The question then is, could appellant, having failed to comply with its contract as to payment for machines actually received, accepted and disposed of by it with full knowledge of the breach by appellee as to time of delivery and number delivered, maintain an action on the contract for such breach.

We have no doubt that this contract, though one, was

severable, embracing independent obligations of the parties as to delivery on the one part and payment on the other, under the several orders for machines given by appellant, the principal difference between which and an entire contract is, that either party to one of the former kind having fully performed as to any independent agreement, may maintain an action thereon for its breach by the other, without averring or proving performance or its equivalent on his part as to all; but subject to defendant's right to recoup for his failure as to others, in respect of which he is himself not in default.

And on general principles, either party to a contract, whether entire or severable, may recover as on an implied agreement, for a partial performance which has been voluntarily accepted by the other with full knowledge of the breach, but subject also to the latter's right to recoup for the failure to fully perform the express contract.

Appellant here is not seeking damages as on an implied agreement, nor by way of recoupment, but by action on the express contract; and we understand it to be an elementary and inflexible rule in such case that it must aver and prove it is not itself in default as to the agreement, for the breach of which by appellee it brings the suit.

The proposition for which it contends, as stated in the argument, is that, "where the vendor has not delivered all the goods contracted for and the vendee has not paid for all he has received, the damages of vendee and purchase price due the vendor, will be set off or recouped, and a judgment rendered for vendor or vendee for the balance due the one or the other, as the case may be."

For application here, this statement seems to concede what the evidence also seems to prove, that neither party had complied literally or substantially with the terms of its agreement. As to the machines delayed, that of defendant was that they should not be delayed, and that of plaintiff that for all it accepted, though delayed, it would pay in the manner prescribed, as if they had not been delayed. At, and from the very beginning of their dealings, these agree-

ments were violated by each, respectively, and by the plaintiff willfully. For the machines ordered but not delivered, as well as for those delivered and accepted but not paid for, it finally declared its intention, deliberately, in writing, not to pay one cent, except upon a precedent condition not imposed by the agreement, the performance of which it had the power to delay, if not practically to prevent.

We think these facts disprove the averment in the declaration of plaintiff's readiness to receive and pay for the goods according to the agreement.

The parties then being alike in default, how can either maintain an action upon the contract, for its breach by the other? What hinders the application of the rule in such case that *potior est conditio defendentis*?

It is said the position contended for is supported by a line of decisions of which thirteen are cited as examples. Seven are stated generally, or quoted from, and are therefore presumably the strongest in appellant's favor. An examination of these and several of the others fails to discover that either of them goes further than is above stated as familiar law relating to entire and severable contracts—the right of recovery for partial performance and of diminution or extinguishment of plaintiff's claims, by recoupment. Neither seems to touch the pivotal point in this case, namely, the right of a party to recover, as plaintiff, for the breach of an agreement, entire or independent, which he has himself, without legal excuse, failed to perform substantially in full.

The one most confidently relied on as containing every element of the case at bar, and the only one in which, as here, the vendee was plaintiff, is that of *Corcoran v. The Lehigh Coal Co.*, 138 Ill. 390. In that case the agreement, made August 20, 1886, was that the company would deliver to him, at his dock, 12,000 tons of coal—grate, small egg, stove and chestnut—at stated prices per ton for each kind, and an additional amount, at his option, at its own dock, on other terms also stated. No time was fixed for delivery, but since plaintiff was a coal dealer, presumably it was

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intended to be from time to time as he should order to meet the demands of his trade. The terms for the 12,000 tons were: "We will take your paper at three months, with six per cent interest, and will renew the same when it becomes due, to accommodate you, but you are to pay the same as fast as you can." He was also to give a satisfactory guarantee.

When delivery was first made, or first refused, or when the suit was commenced, does not appear. Nor, in view of the total price, what it had paid, the credit given and privilege of renewal, do we think it certainly appears that plaintiff was ever in default as to the agreement on his part; though from the finding of a balance against him on defendant's plea of set-off—which was not only for goods sold and delivered, but also for money found due on settlement—it may be inferred that he had either failed to give his paper for the coal received, or had failed to pay it at maturity before he brought the suit. If he gave it according to the agreement, the failure to pay it would not be a breach of the agreement.

But whichever may be the facts, the question here involved was not presented by counsel nor considered by the court. There is no allusion to any such question in the opinion. It seems to have been assumed and conceded that plaintiff was in condition to recover upon the contract, if defendant had broken it. He claimed damages for a failure to deliver according to the agreement for 12,000 tons and also according to the option clause. The Supreme Court say the principal controversy on the trial was as to the latter; "not as to his legal right to such damages under the contract, but whether or not, as a matter of fact, the defendant had failed to furnish him coal as required, and whether he was damaged thereby." The trial judge refused all the instructions asked and gave a series prepared by himself; of these, the first told the jury it was admitted that defendant failed to furnish 4,279 of the 12,000 tons, and that plaintiff's damages were one dollar per ton, which they should allow him, with interest at six per cent, from Novem-

ber 30, 1886, making \$5,134.70, under that agreement. The second related to the claim for damages under the option clause. It appeared that the jury allowed him the amount stated by the judge, but nothing under the option clause, and found a balance for defendant for coal delivered, which included a large amount for delivery, at the highest prices fixed by that clause. The Appellate Court held the option clause illegal and void and refused to consider the evidence on that branch of the case, but affirmed the judgment. In the Supreme Court, according to the opinion, the appellee (defendant) contended it was void, and the court say: "Counsel for appellant acquiesced in the view that said clause is void, but insist that it must be taken together with the contract for 12,000 tons of coal, thereby rendering it void also; therefore they say, while appellant could recover no damages for the failure to furnish him coal at appellee's dock, neither can appellee recover the price fixed by that contract for coal actually delivered. That position can not be maintained." The court then proceed to show that the option clause could not have formed any part of the consideration for the agreement as to the 12,000 tons, and therefore, though illegal, could not have affected the validity of that agreement; and that upon that theory the judgment was not correct. They hold that appellee could not escape liability under that clause upon the ground of its illegality and at the same time under it recover, as by the judgment he did, the price of the coal furnished; and further find that there was nothing whatever in the record to warrant the assumption in the first instruction, of an admission that plaintiff's damages for the failure to deliver under the 12,000 ton contract was one dollar per ton. For those reasons, and those only so far as appears, they reversed the judgment.

In the report of the case we do not find a word indicating that counsel on either side or the court supposed the question here presented was involved. It was not decided, expressly or by implication.

That question, here distinctly presented as the controlling one, is whether a vendee who has accepted goods delivered

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under an express contract, but not at the time or in the quantity required by it, with knowledge of the default of the vendor in those respects, but has himself failed, without legal excuse, to pay for them according to it, can maintain an action on the contract for such default of the vendor. We think the general rule, everywhere recognized, is against it, and has been specifically so applied in analogous cases in Illinois. *Pennsylvania Coal Co. v. Ryan*, 107 Ill. 226; *Bradley v. King*, 44 Ill. 339; *Stewart v. Many*, 7 App. 517.

For appellant the attempt is made to evade the force of these decisions by the claim that appellee was first in default, whereby appellant was damaged to an amount exceeding the price of the goods received for which he failed to pay, and from that time until the suit was brought always had a just claim for damages by appellee's default exceeding the amount for which appellant was in arrears for machines delivered to and accepted by it. In other words, that price of machines accepted and damages for delay in the delivery of them and for the non-delivery of others considered, appellant being judge, it never really did owe anything for what it accepted more than it paid for when due and in the manner prescribed by the agreement, and therefore was not bound to give the acceptances it withheld. But the question is not whether, upon a fair settlement, offsetting damages against price, appellant really owed anything, but whether, accepting the machines under the contract, it performed that contract on its part as to payment.

A like attempt under like circumstances was made in the case of *Bradley v. King*, *supra*. There, by contract made in February, the vendor agreed to deliver a million feet of lumber by the 1st of September then next. By that time there was delivered only about 218,000 feet. By the 29th nearly 600,000 feet more were delivered, the last cargo—about 175,000 feet—being delivered on or near that day. The vendee accepted it, but refused to pay for it, and brought the suit for damages for failure to deliver according to the terms of the contract. Defendant pleaded the refusal to pay for the last cargo, and on demurrer the plea

was held good. The court held that though delayed, its acceptance bound the vendee to pay for it as if it had been delivered within the required time, and the refusal excused further delivery; and say that "if plaintiffs sought at the time of the delivery of the last cargo to pay for it by setting off their damages, it was incumbent on them to have made a distinct offer so to do to the defendants. In order to defeat the effect of this plea, they should either have traversed the averment of refusal to pay, and proved, on the trial of the issue, that damages were due them equal to the value of the cargo, and that they offered to the defendants to release the damages to that amount, or they might have replied these facts specially to the plea. But the plea, on demurrer, should have been held good."

Such an offer, if the damages proved were equal to the value of the cargo, would have been equivalent to performance. But performance or its equivalent, or a legal excuse for non-performance, must be averred and proved. In this case there was no such averment or proof. Plaintiff received invoice after invoice of machines accepted, without paying as it was bound by the agreement, or offering to pay by offsetting damages or intimating that it would claim damages on settlement. Even after such intimation, if made in its letters of April 19th and 26th, it was substantially withdrawn by those immediately following. The next one shown in the abstract, under date of May 27, reads thus:

"Gentlemen: Herewith find note for \$1,434.46, which is to apply on our account and which will cover invoices as per statement attached. There are possibly a few shipments made since the 25th inst. that will not appear on this statement. They will be settled for as soon as the wheels are received and checked in. You will understand that when shipments are made by freight that there is a few days' delay at each end, and sometimes our office force is crowded and the bills are not checked in promptly."

This shows payment in part in the manner prescribed by the contract, and a clear promise to pay the balance, if any, in the same manner, and not by offsetting any claim for

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damages, when the wheels should be received and checked. On June 2d it requested appellee to cancel all orders it had not filled; not on account of its claim for damages, but because of "the continued rains and bad roads throughout the entire country," causing a falling off of its orders for bicycles and the cancellation of many it had received, and adding: "We believe this will be but temporary, as it certainly can not rain all summer, and if it fairs up soon there will be a big demand; still we do not want to load up at this time." June 16th, it wrote: "We hand you herewith our paper to the amount of \$814.42, to cover items as per enclosed statement of account. Please receipt and return statement and oblige."

June 23d, it made some complaint of defects in wheels lately received, but not a word about a claim for damages, and the next is that of July 23d, announcing its intention not to pay another cent until there should be an adjustment of its claim, as herein above stated. These five letters are all of appellant's that are abstracted, from the date of the first to that of the last. During all this time it was willfully withholding its acceptances for machines received, and was in arrears when it brought the suit. They had been received on the terms of the contract as to payment which was to be made on delivery. Appellant refused to comply with those terms. It therefore could not maintain an action on the contract for the delay in shipment of the machines received, and by the refusal the vendors were excused from further delivery. Appellee was not bound to go on delivering, without receiving a cent in payment until appellant's claim for damages, known to be contested, should be adjusted to its satisfaction.

Nor do we see how it could take advantage of appellee's default even if it were here seeking to do so by way of set-off or recoupment. Set-off is a counter claim, as to which the defendant is plaintiff and must establish his right as upon a distinct action; and therefore, if for breach of contract, must show he is not himself in default as to the agreement, whether entire or severable, on which he bases his claim,

which in this case it seems appellant could not do. And the same obstacle would stand in the way of recoupment; for though recoupment considered as a right, enables a delinquent defendant, conceding to the plaintiff a cause of action, to prevent a recovery or reduce its amount, it is not upon any merit of his own, but for the fault of the plaintiff in connection with the same transaction on which he sues. The burden of proving such fault rests upon him, and is the same it would be if he were plaintiff, suing for the damages caused by it; and hence if that fault consist in the breach of another agreement, independent of the one on which plaintiff sues, but contained in the same instrument and relating to the same subject-matter, he must show, in like manner, that he is not himself in default as to that agreement. *Hedstrom v. Baker*, 13 Ill. App. 104, and authorities there cited; *Mendel v. Fink*, 8 Ill. App. 378. The principle is that neither party can by any means obtain the aid of a court to enforce in his favor a contract, which, without legal excuse, he has substantially failed to perform on his part.

It is not pretended that appellant made or offered to make any case under the common counts, and for the reasons here stated we are of opinion it could not recover on the contract. Judgment affirmed.

B. S. Green Company v. George L. Smith.

1. **QUESTIONS OF FACT—*Proper Instructions—What is Error.***—Where the contention is solely an issue of fact and the jury have been properly instructed as to the law, the judgment will be affirmed unless error is found in the rulings of the court as to the admissibility of evidence, or the evidence is insufficient to support the verdict.

2. **MEASURE OF DAMAGES—*When the Market Value of Goods is.***—Where a party proceeds upon the theory that goods were sold without contract, he is properly allowed to prove their market value.

3. **ACCOUNT STATED—*When Conclusive as to Prices and Amounts.***—

52	158
58	556
58	564
52	158
76	640

B. S. Green Co. v. Smith.

As between merchants an account rendered is deemed to be conclusive as to the price given and amount stated, if not objected to within a reasonable time, unless some fraud, mistake, omission or inaccuracy is shown.

Memorandum.—Assumpsit for goods sold. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 4, 1894.

The opinion states the case.

KERRICK, LUCAS & SPENCER, attorneys for appellant.

EDWARD BAREY, attorney for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The judgment below was against the appellant company upon the verdict of a jury in an action brought by the appellee to recover the amount of several bills of saddlery and harness, goods sold and delivered to it. The purchase and delivery of the goods was not denied but the appellant company contended that it was under a contract alleged to have been made by a traveling agent of the appellee entitled to a discount upon the prices stated in the bills. The appellee denied the alleged contracts for the discounts as claimed. This contention was the sole issue of fact. It is not complained that the jury was improperly instructed as to the law. Hence the judgment must be affirmed unless error is found in the rulings of the court as to the admissibility of evidence or the evidence is insufficient to support the verdict. A deposition of the appellee was read in evidence. The appellant, when the deposition was offered in evidence, objected to certain interrogatories and answers thereto. At the taking of the deposition cross-interrogatories were propounded in behalf of the appellant, but no objection was then made to any questions propounded by the appellee or to any answer of the witness. The objections made in the court at time of the trial are all of a character that could have been obviated had they been made known when the deposition was taken. Such objections can not, under such

circumstances, be preferred for the first time when the deposition is offered in evidence during the progress of the trial. *Kassing v. Mortimer*, 80 Illinois 602; *Goodrich v. Hanson*, 33 Illinois 498. We have, however, examined the deposition and think the objections without merit.

While it is true that the only testimony as to the conversation of the agent of the appellee, out of which it is claimed the contract for discounts arose, was that of a witness in behalf of the appellant, yet facts and circumstances proven tended to deny the existence of the alleged contract. The appellant company was engaged in the business of a wholesale dealer in harness and saddlery goods. The appellee, who was a manufacturer of such goods, rendered his bills for goods sold to appellant from time to time, in which bills the articles sold were itemized, prices stated, and total amount given without allowing the discount claimed to have been contracted for. These bills were returned by the appellant without objection, and it made payments upon them, or some of them, at different times. Other facts and circumstances appearing in the proof tended to dispute the alleged contract for discounts.

So we think the evidence presented to the jury a fair question of fact whether such contracts had been made, upon which there was conflicting testimony. We can not say that their verdict upon it is manifestly wrong.

The court permitted evidence as to the market price or reasonable value of the goods. This it is thought was error.

The appellee proceeded upon the theory that the goods were sold without contract and therefore was properly allowed to prove their market value.

Further the case seems to fall within the rule of law that as between merchants an account rendered is deemed to be conclusive as to price given and amounts stated if not objected to within a reasonable time, unless some fraud, mistake, omission or inaccuracy is shown. *McCord v. Manson*, 17 App. 121; *Mackin v. O'Brien*, 33 App. 476. The judgment must be affirmed.

**John J. McLean, Samuel D. Thomas, Henry M. Thomas,
Elizabeth J. Eads, Executors, etc., of the Last
Will and Testament of Samuel R. Thomas,
Deceased, v. Elizabeth Thomas.**

59 161
159 227

1. **WIDOW'S ALLOWANCE**—*What is a Generous and Suitable Maintenance.*—A testator in disposing of his property, provided by his will that the remainder of his residuary estate, consisting of capital stock in national banks, should be held in trust by trustees, and out of the proceeds they should pay to his wife a generous and suitable maintenance and support, such as might be mutually agreed upon by said wife and trustees, taking into consideration the value of his estate and the fact that she had greatly contributed in accumulating said estate. And in case the wife and trustees should be unable to agree upon the amount, then they should pay such amount as might be ordered by the Circuit Court of said county. Not being able to agree, the widow applied to the Circuit Court and an order was made requiring the trustees to pay her the sum of \$1,700 per annum for her maintenance and support. It appeared that the estate was worth about \$150,000 and that the stocks of the banks amounted to \$19,500. *It was held*, that the amount allowed was fully warranted by the evidence.

2. **JURISDICTION**—*In Chancery, Confined to the Purposes of the Bill.*—Under a bill in chancery, filed by a widow to enforce the provisions of a will, praying that defendants may be required by the order of the court to pay to her the income or dividends upon bank stock, and also one-third of the rental value of lands, the court has no jurisdiction to determine the question of homestead or dower in the testator's estate or whether the widow has taken and converted to her own use moneys and property belonging to said estate.

3. **SOLICITOR'S FEES**—*As Costs, When Proper.*—Where a widow files a bill in pursuance of a provision of a will to fix her allowance out of the estate of her husband and which is resisted by the trustees of the estate, the allowance of her solicitor's fees as costs is proper.

Memorandum.—Bill to enforce provisions of a will. Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 4, 1893.

The opinion states the case.

GEORGE L. ZINK and JAMES M. TRUITT, attorneys for appellants.

AMOS MILLER, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Samuel R. Thomas died October 3, 1890, seized and possessed of an estate estimated at about \$150,000, consisting of 2,320 acres of land and \$45,000 in personal property, including \$19,500 in bank stock. His will was admitted to probate on the 8th, and letters testamentary were issued to appellants on the 23d of the same month. Besides his widow, the appellee, he left surviving him several sons and daughters, and a grandson, the child of a deceased daughter. The dwelling house he occupied as a homestead is worth four or five thousand dollars. Appellee has continued to occupy it since his death, and about forty-five acres of pasture land in connection with it.

By his will he devised all his land in parcels to his several heirs, respectively, for their natural lives, with remainder to their children, and also disposed of his personal property. The provision thereby made for his wife is as follows:

"The residue and remainder of my said residuary estate, consisting, as above stated, of capital stock in the Hillsboro National Bank and the First National Bank of Litchfield, Illinois, my said trustees shall continue to hold in trust, and out of the proceeds of said trust fund, using for that purpose the interest or dividends derived therefrom, pay to my beloved wife, Elizabeth M. Thomas, in at least quarterly payments, and oftener if necessary, the first payment to be made not longer than ninety days after my death, a generous and suitable maintenance and support, such as may be mutually agreed upon by my said wife and trustees, taking into consideration the value of my estate and the fact that she has greatly contributed in accumulating said estate. And in case my wife and trustees are unable to mutually agree upon the amount which they shall pay her for her maintenance and support, then they shall pay her such amount as may be ordered to be paid to her by the Circuit Court of said county, as hereinafter provided. It being my will and intention that my said wife shall receive a generous and suitable maintenance and support out of my estate for

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and during the term of her natural life. The remainder, if any there be, of said interest or dividends derived from said bank stock after payments to my beloved wife as aforesaid, shall be held in trust by said trustees during the life of my said wife, and be invested and reinvested in this State or elsewhere, in real estate, stocks, bonds, notes, mortgages or otherwise, and at the best rate of interest, or so as to secure the largest and safest income, as in their interest (opinion) may best promote my estate and increase the value of said trust. * * * It is my will that my dear wife shall not be required or compelled to accept the provisions of this will in lieu of any interest which the law casts or confers upon her in any of my real estate which I have set off to my said sons and daughters, respectively, and have conveyed to my said trustees for the use and benefit of my said grandson, as I intend and so will that her rights and interests in all of the real estate aforesaid shall remain wholly undisturbed and unquestioned during the term of her natural life; but I trust that there will never be any occasion for her to assert her rights in regard to said lands, and hope that she will be liberally supported and maintained without recourse on said lands. And in case said trust fund shall, from any cause at any time, prove inadequate and insufficient to provide her with such generous, ample and liberal maintenance and support as is intended by me, then it is my will, and I so direct, that she shall have a first, paramount and subsisting lien on all of said real estate, and the rents, issues and profits thereof, which I have set off to my said sons and daughters, respectively, for the terms of their natural lives, respectively, as aforesaid, and which I have conveyed to my said trustees for the use of my grandson, as aforesaid, to secure to her such maintenance and support during the term of her natural life, which lien may, whenever the circumstances demand it, be duly enforced by my dear wife taking and receiving so much of the rents, issues and profits of said lands as may be necessary to provide her with such maintenance and support. By accepting the provisions of this will, my dear wife shall release her dower in any other lands than those

above described and mentioned, which I may own at the time of my death."

To this he added the following direction: "And for the better protection of my dear wife I do hereby further order and direct that if any difference should arise between my dear wife and my said trustees or their successors in trust as to the amount which shall be paid to her for her maintenance and support and the times of payment, that it shall be the privilege of my said wife and the duty of my said trustees to make application to the Circuit Court of said county (the opposite party being duly notified of such application being made) to adjust such differences and determine the amount which she shall receive out of my estate for her maintenance and support and when the same shall be made. And it is my will that any such order may on like application by either party from time to time, as the changing circumstances may require, be modified, altered or set aside, and the amount ordered to be paid increased or diminished as to the court may appear just and right."

Appellee filed the bill herein, setting forth the death of the testator, her relation to him, the character and value of his estate, the provisions of his will, its admission to probate and the acceptance by appellants of the trust it imposed, and alleging that the differences contemplated by this direction had arisen; that the defendants had made but one payment to her, of about \$900, and upon various pretexts, of which the only one stated is that they could not agree with her upon the amount to be paid, had refused to pay any further sums. It also stated that she had an estate of homestead and dower interest in the lands disposed of by the will, the rental value of which is four dollars per acre, and that it is therein provided that the interest or dividends derived from the bank stock mentioned should be paid to her. But all the relief prayed is "that defendants may be required by the order of the court to pay to her the income or dividends upon the bank stock immediately after the same shall be declared and is payable by the banks, and also one-third of the rental value of said lands in quarterly installments."

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The answer denies that complainant has an absolute and unqualified estate of homestead and dower interest in said lands or the right to receive all the dividends upon said bank stock, and some other averments of the bill which we think immaterial, but admits the will as alleged and avers that defendants have been at all times and are now ready and willing to carry out all its provisions relating to complainant, but have been unable to do so because of the difference of opinion between her and them as to her rights under said will. It admits that they have paid her only about \$900, but avers that they would pay her more if it were necessary for her maintenance and support and she would receive it, and that at one time they offered to pay her the further sum of \$300, which she refused to accept unless all the dividends then collected on the bank stock were paid to her. And it charges that she has received and appropriated to her own use a considerable amount of money and personal property of the estate specified for which she ought to account before claiming further payments.

A replication was filed, a reference to the master ordered, proofs taken and reported, and a form of decree entered, which finds that the testator died October 3, 1890; that his will was probated; that appellee is his widow, and that appellants are executors of said will; that appellee was to be paid a generous and liberal maintenance and support; that in case appellants and appellee could not mutually agree upon the amounts to be paid, then it was appellee's privilege and appellants' duty to make application to the Circuit Court to adjust amount, and that there is a difference between them as to such amount; that the value of the testator's estate is about \$150,000; that appellee is now and has been since the testator's death in possession of the testator's late homestead, together with the buildings and about forty-five acres of land, and has received the rents, issues and profits thereof, and that the annual rental value of said homestead is \$300.

The court ordered that appellants, as such executors, shall pay to appellee during the time she has occupied and shall

continue to occupy the dwelling house, buildings and forty-five acres of land, the sum of \$1,700 per annum for her maintenance and support, and that appellants shall be credited with any payment or payments which they may have heretofore made to appellee for her maintenance and support under said will, said allowance to commence October 3, 1890. For the year 1893 and thereafterward said sum of \$1,700 shall be paid in semi-annual payments of \$850, on the 3d day of January and July in each year. If the appellee shall abandon or surrender up the possession of said dwelling house, buildings and forty-five acres of land, and cease to occupy the same, appellants shall from the time such possession shall be delivered up pay to appellee \$2,000 in semi-annual installments of \$1,000, at the dates aforesaid.

The court further orders that a solicitor's fee of \$250 be paid by appellants out of said estate to Amos Miller, appellee's solicitor.

The court holds that it has no jurisdiction to determine whether or not appellee has homestead or dower in the testator's estate or whether or not appellee has taken and converted to her own use moneys and property belonging to said estate, or to determine the amount of money, if any, which appellants have paid appellee for her maintenance and support, and therefore declines to hear and determine said matters.

From this decree the defendants appealed.

We think the assignment for error that the court below refused to decree that appellee did not have a homestead and dower interest in the lands, and to settle the account charged in the answer for money and personal property of the estate received and appropriated by her, involves the controlling question in the case, namely, the extent to which it could properly inquire and act under the pleadings.

There is no claim that it could have set off a homestead or assigned dower, even if her claim of right thereto had been admitted by the answer. The bill did not seek it. The proper parties were not before the court. It certainly was not a bill for an accounting, and there was no cross-bill.

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Counsel for appellants also concede that it did not ask for any construction of the will, and say that none was necessary. That proposition has our full concurrence.

As we understand it the object was simply and solely to get an impediment to the execution of a direct and express trust removed and a decree thereupon for its execution. Complainant was the *cestui que trust* and defendants the trustees. The trust is stated in the bill and created by the will of her deceased husband therein set forth. As thus shown it is simply to pay to her out of a certain fund, for her support and maintenance, certain sums and at certain times, to be determined by their mutual agreement, or, in case of their inability to agree, by the Circuit Court of Montgomery County. It is thus further shown that the amount to be so paid was to be sufficient for her liberal and generous support, considering the value of his estate and the fact that she had greatly contributed toward its accumulation, and that the questions of amount and times of payment were to be determined and the first payment made not longer than ninety days after his death. The bill is filed against them not in their general character or with reference to their other powers as executors of said will, but only as trustees of the particular fund and for the particular purpose in that behalf therein stated. The fund consisted of \$19,500, invested in the stock of two certain banks. The amount of dividends thereon is not stated.

It is averred that the parties have been and are unable to agree upon the amount to be paid to her and the times of payment, by reason whereof the trust is not executed, and can not be until that impediment is removed by the adjustment, by the court, of the differences between them and its determination of those questions. according to the will creating the trust, in such case made and provided.

It is not charged, nor was it necessary to charge, that in differing from her upon the questions stated, the defendants acted fraudulently, dishonestly, or without right on their part so to do, but only that they have in fact differed, and that by reason thereof complainant, except to the extent of \$900,

has failed and is failing to receive the benefit of the trust so created in her favor and to which she is in equity entitled.

The emergency and condition upon which, according to the terms of the instrument creating the trust, the court was to intervene and determine those questions, are thus alleged to have happened; and the prayer, in substance, is that the court do intervene and determine them, and thereupon order that the defendants pay her accordingly. This, in our opinion, is all that is essential or material in the bill. The statement of her interest in the land, as well as in the trust fund, as complainant understands it, and the prayer that upon that basis her allowance may be fixed, do not change the questions or the case for the consideration of the court. She did not ask for a homestead, or dower, or for rent, as rent, but for money for her maintenance and support, to be paid in amounts and at times to be determined by the court; and that was to be the extent and limit of the court's determination, as fixed by the trust.

The answer admits all the material averments of the bill, their character, and capacity of defendants as trustees, the terms of the trust, the failure of its execution and the reason thereof, and the right of complainant as *cestui que trust* to an allowance out of the trust fund, of money for her maintenance and support in the style indicated, to be paid to her by them in amounts and at times to be determined as alleged in the bill. Their denial of her claim of homestead and dower in the lands and of right to all the dividends on the bank stock which constitutes the trust fund forms no issue in the case made by the bill. Their consideration is unnecessary for any purpose contemplated by it. That purpose was simply to ascertain and fix the amount of money to be allowed for her support and the times of payment.

In so doing the court was expressly directed by the terms of the trust to take into consideration the value of the testator's estate and her meritorious agency in its acquisition, and his declared intention that the allowance should be amply generous, and liberal for the purpose indicated. It was necessary to consider her age, health, social position,

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habits and tastes, and the probable effect of the change in her mode of living in consequence of her being then a widow and living alone. The court had all the information on these points that the parties saw fit to furnish. It was also proper to consider the fact that ever since the death of her husband she had been and then was occupying their homestead without charge for rent, because from such occupancy she had been and then was deriving some means of support and would, of course require so much less for her allowance out of the trust fund for that purpose while she so occupied it. But we fail to perceive how its determination could be affected by the question of her claim of right to homestead and dower and all the dividends upon the bank stock, unless she was actually receiving, under such claim, some such means. Under the circumstances, and since she was not receiving any thereunder, we think the court rightly refused to consider questions that may or may not hereafter arise between her and the devisees upon such claim. Should she succeed in any attempt to enforce it and so acquire additional means of support, the changed conditions can be fully met by an application for a change in the order of allowance out of the trust fund.

We are of opinion that the amount allowed was fully warranted by the evidence, and that the solicitor's fee might well be regarded as a part of such allowance and made under the will, rather than in the light of any technical rule of law. The court intended that the amount to be paid to her was not to be diminished by expenses already incurred to procure its determination. But appellants were alike active in procuring it. All the parties were seeking it, and it was for the benefit of all alike. The necessity for it arose under the provisions of the will, without any wrong on either side. The testator might have prevented it and the case bears some analogy to one brought for construction of a will. In such case the expenses, including solicitor's fees, are generally borne by the estate. *Missionary Society v. Mead*, 131 Ill. 375. Perceiving no substantial error in the record, the decree will be affirmed.

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91 132

Jennie McPherson and Charles McPherson v. Richard H. Wood, Administrator of Alletta Thompson.

1. *CORAM NOBIS—Writ of, Abolished—Remedy by Motion.*—The writ of *coram nobis* was employed only to supply or rectify a mistake of fact in a decree or judgment not put in issue or passed upon by the court. The writ was abolished by Sec. 87, Chap. 110 R. S., which provides that such mistake may be corrected by motion in the court, wherein the judgment or decree was entered. The motion is therefore only effectual to reach such mistakes of fact as might have been corrected by the writ, *coram nobis*, before it was abolished.

2. *DEATH—Of Plaintiff, Pending Suit.*—The death of a plaintiff or complainant must be taken advantage of by a plea in abatement, otherwise the judgment or decree will be binding upon the adverse party.

3. *MASTER IN CHANCERY—Failure to Report Sale.*—The failure of a master to report a sale to the court, is not of itself reason sufficient to warrant the court in setting aside the sale.

4. *MASTER IN CHANCERY.—Duty to Report.*—The master in chancery is a public officer, an agent of the court, engaged in discharging an official duty. He is required to make his report of sales to the court and either party to the proceeding can compel the performance of such duty at any time.

5. *MASTER IN CHANCERY.—Reasons for Filing Duplicate Certificate.*—The statutory requirement that a master shall file a duplicate certificate of purchase in the office of the recorder to be spread upon the public records, is not for the purpose of notifying the parties to the foreclosure proceeding that the master has executed the decree, but to notify persons who, as judgment creditors or subsequent purchasers, or otherwise, are interested in but not connected with the proceedings as parties.

Memorandum.—Mortgage foreclosure. Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

STATEMENT OF THE CASE.

At its June term, 1891, the Macoupin Circuit Court rendered a decree in foreclosure in the case of Alletta Thompson v. Charles McPherson et al., with an order that the master, after giving notice thereof, as specified in the decree, should make public sale of the mortgaged premises, subject to redemption. Under the decree, the master exposed the lands to sale on the 13th day of June, 1891, and

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then struck off and sold the same to Richard F. Wood, the appellee, the highest bidder therefor. The master, having information that the complainant in the decree had died, refused to deliver a certificate of such purchase to Wood, or to file a duplicate thereof in the office of the recorder of the county, until there should be delivered to him a receipt for the decree debt and interest from the executor or administrator of the complainant. On the 19th day of November, 1892, the master filed, in the County Court, a report that he had made sale of the premises in accordance with the requirements and directions of the decree, but had withheld, and still withheld the certificate of purchase, awaiting proper receipts for the decree debt and costs, and further informed the court that certain parties assuming to represent the deceased complainant, had tendered receipts therefor, but that, on account of the objections of counsel for the appellants herein, he had declined to act in the matter, except upon the order of the court as to his duty in the premises.

The appellee, the purchaser at the master's sale, appeared, advised the court that he had been duly appointed administrator of the complainant, and entered his motion that the purchase by him of the land at the master's sale be approved, and, upon the execution of proper receipt by him as administrator, that the master be ordered to execute and deliver to him a master's deed for the premises. The appellants resisted this application of the appellee and filed their motion, as follows:

The defendants move the court, *coram nobis*, to vacate the decree and set aside the sale made thereunder heretofore granted and entered in this court for the reasons following:

First. Because said decree contains error of fact.

Second. Because the complainant, Alletta Thompson, died long before the entering of this decree and was not in being at the time of the hearing in said cause and the making of said decree.

Third. Because there was no proper notice of said sale.

Fourth. Because there was no certificate of said pre-

tended sale filed in the clerk's office of said court within ten days, or at any other time, as required by law.

Fifth. Because, the complainant being dead, and there was no administration on her estate, there was no person to whom the defendant could have paid the amount found due the complainant by said decree before said pretended sale.

By A. N. YANCEY, defendant's solicitor.

After a hearing the court entered a decree ordering the master to deliver to the said Wood, the appellee, a certificate of purchase upon the delivery of a proper receipt from the administration of the complainant, and further ordered the master upon presentation of such certificate to him to execute a deed for the premises to the appellee. This is an appeal from this order or decree.

A. N. YANCEY, attorney for appellants.

E. W. HAYES and RINAKER & RINAKER, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The writ of *coram nobis* was employed only to supply or rectify a mistake of fact in a decree or judgment not put in issue or passed upon by the court. The writ was abolished by Sec. 67, Chap. 110, R. S., which provides that such mistake of fact may be corrected by motion in the court, wherein the judgment or decree was entered. The motion is therefore only effectual to reach such mistakes of fact as might have been corrected by the writ, *coram nobis*, before it was abolished.

In rendering the decree of foreclosure, the court necessarily passed upon and determined the amount due to the complainant upon the original indebtedness, and for attorneys' fees, under the provisions of the mortgage, and also necessarily determined that the execution of the mortgage created a lien upon the mortgaged premises, which, of course, included the power and right of the mortgagor to execute the instrument. Therefore the motion *coram nobis* did not

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operate to bring such questions of fact again before the court.

Of all the facts sought to be pressed upon the attention of the court upon the hearing, the motion *coram nobis* had efficacy to bring before the court only one question, whether Alletta Thompson, the complainant in the decree, was living when the decree was rendered, and to authorize the court to consider and determine the effect of the decree if it should appear that she was not living when it was rendered. It is well settled that the death of a plaintiff or complainant must be taken advantage of by a plea in abatement, otherwise the judgment or decree will be binding upon the adverse party. *Life Association v. Fassett*, 102 Ill. 315. The ruling of the court upon the motion as a motion *coram nobis*, was therefore well advised and correct.

The decree of foreclosure and order of sale was a final decree and became conclusive upon the defendants, as it was not appealed from. *Myers et al. v. Manny*, 63 Illinois 211.

Hence, we can not consider whether errors intervened in the proceeding antedating the decree or in the action of court in rendering the decree. It only remains to determine as to the propriety and correctness of the ruling of the court upon the matters set forth in the motion of the purchaser, Wood. The failure of the master to report the sale of the court was not of itself reason sufficient to warrant the court in setting aside the sale. *Moore v. Titman*, 53 Ill. 358.

The remaining contention is that as the master failed to report the sale until after the time allowed by law to the appellant in which to redeem from the sale had expired, the order of the court directing the delivery of the certificate to the appellee (the purchaser) and that the master execute a deed to such purchaser upon presentation of the certificate and demand therefor, had the effect to deprive the appellants of all right and opportunity to make redemption. We do not see the force of this insistence. The appellants were parties defendant to the decree of foreclosure. It is to be presumed that they knew that the land was to be sold by the master. Public notice as required by the decree was given of the

time and place of the sale. The master was a public officer, an agent of the court engaged in discharging an official duty. He ought to have made report to the court, and either party to the proceeding could have compelled the performance of such duty at any time.

It does not appear that the appellants were, in fact, ignorant of the fact that the land had been exposed to sale by the master, nor does it appear that they sought information as to such sale, or as to the acts of the master under the decree. Inquiry of the master would, no doubt, have fully advised them, or the aid of the court might have been invoked to that end. Under such circumstances, it is to be presumed that they were cognizant of the sale, and of all that publicly transpired there. The lands were then and there publicly struck off and sold to the appellee, Wood. The statutory requirement that the master shall file a duplicate certificate of purchase in the office of the recorder to be spread upon the public records, is not for the purpose of notifying the parties to the foreclosure proceeding that the master has executed the decree, but the design is to notify persons who, as judgment creditors, or subsequent purchasers, or otherwise, are interested in, but not connected with the proceeding as parties. A failure to comply with the statute can not, therefore be seized upon by a defendant to the decree as grounds of objection to the sale.

It is urged that it was error for the court to direct the master to deliver the certificate to the purchaser without first approving the sale. It is true that the order or decree appealed does not, in express words, approve or confirm the sale, but such is its legal effect.

Believing that there is no substantial ground of objection to the order appealed from, it is affirmed.

**Lake Erie & W. R. R. Co. v. Jonathan P. Middlecoff,
Charles Bogardus, R. Blackstock, Wm. Wilson, and
R. Cruzen, Partners Doing Business as the
Paxton Canning Company, Who Sue for
Themselves, the Ins. Co. of N. A.,
Continental Ins. Co., and the
Phoenix Ins. Co.**

58 175
150s 37

1. RAILROADS—*Appropriating Streets—Duty to Keep Same Free from Rubbish.*—Where a street is so occupied by the main track and switch of a railroad company as to practically exclude all other use, it ought to keep the portion so appropriated free from rubbish and dry grass that might communicate fire to adjoining premises, and is clearly responsible for negligence in that behalf.

2. RAILROADS—*Engines Throwing Sparks in Other Places.*—In an action against a railroad company for causing fire by sparks from an engine, it is not error to admit evidence that the same engine threw sparks at other points and set several fires along the route before reaching the place in question.

Memorandum.—Case for burning property. Appeal from the Circuit Court of Ford County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

CLOUD & KERR and A. E. DEMANGE, attorneys for appellant; W. E. HACKEDORN, general attorney, of counsel.

APPELLEES' BRIEF, THOMAS BATES, COOK & MOFFETT AND J. H. MOFFETT, ATTORNEYS.

The law of this State makes it the imperative duty of appellant to keep its right of way free and clear of dry grass, dead weeds, or other dangerous combustible matter. R. S., Chap. 114, Sec. 63 (Starr & C.).

The failure to do so is negligence, *per se*. C. & E. I. R. R. v. Goyette, 133 Ill. 21; St. L., A. & T. R. R. Co. v. Huggins, 20 App. 639; Northern Pac. R. R. Co. v. Lewis, 51 Fed. Rep. 658-665; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 540-553-555.

It is the duty of the court to so instruct. *Chicago & E. R. R. Co. v. Smith* (Mich.), 33 N. E. Rep. 17, '93, 341.

It is not contributory negligence on the part of appellees to permit dry grass, etc., on their lands, which would spread fires, negligently set by appellant. *T. H. & I. R. R. Co. v. Voelker*, *supra*.

It is the duty of the railroad company to exercise greater care and precaution in the ratio the risk becomes greater by reason of the presence of combustible material. *Union Pac. R. R. Co. v. Arthur*, 26 Pac. Rep. 1031; *Jacksonville T. & K. W. R. R. Co. v. P. Land Transp. & Mfg. Co.*, 9 So. Rep. 631 (661); *Gulf C. & S. F. Ry. Co. v. McLean*, 74 Tex. 646.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action on the case by the appellees against the appellant to recover damages for burning a certain "canning factory" building with the machinery and appliances therein.

The verdict was for the plaintiffs, and the damages were assessed at \$8,900. A motion for new trial was overruled and judgment was rendered accordingly. By the appeal of the railroad company the record is brought to this court. Many reasons are urged for a reversal of the judgment. While all the points have been considered, yet it is not thought necessary to discuss them all specifically.

The matter will be greatly simplified by the statement that there is no sufficient reason to challenge the conclusion reached by the jury that the fire was caused by sparks escaping from the locomotive. Indeed, counsel for appellant seems to concede this, and to insist that the only real issue in the case was "whether the spark-arresting appliance on the locomotive was all that the law required and was properly handled." The evidence upon the point as to the spark arrester need not be set forth in detail.

Whatever may have been the real merits of the appliance, it was a fair question for the jury whether it was in good order and properly handled. The fact that the locomotive had been throwing sparks freely for some distance before

reaching the place in question and had set fire to several meadows, that it was being propelled at a rate of speed beyond that allowed by ordinance and that such speed as was shown would be likely to produce a more abundant flow of sparks, were circumstances to be considered by the jury.

The engineer, Daniels, said the engine was in good running order as far as he knew and was in tolerably good repair, and that he saw nothing out of order the last time he looked into it, which was about two weeks before the fire. The witness Sage testified that he examined the netting two days before the fire and several days after, and that it appeared to be in good order both times.

Other expert witnesses said that if the engine threw sparks, as had been testified, before reaching the factory, they could not say it was in proper order. The plaintiffs, however, insisted that the fire was probably communicated to the dry grass and rubbish near the track on the right of way, so called, and thence to the premises of the plaintiffs, and, therefore, that there was negligence upon which recovery might be predicated in suffering this inflammable matter to remain so near the track, regardless of the condition of the spark arrester. There is evidence from which this conclusion might well be drawn.

But the defendant insisted below and now insists that it was under no legal duty to keep the space in question free from combustible matter.

It appears at the point in question the main track was laid along a public street, and that a switch track extended therefrom and alongside the main track to connect with the canning factory. The street was so occupied by the main track and the switch as to practically exclude all other use at this point. The defendant having thus appropriated the street to its own use ought to keep the portion so appropriated free from rubbish and dry grass that might communicate fire to adjoining premises, and would clearly be responsible for negligence in that behalf. *K. & H. Ice Co. v. M. & N. R. R.*, 53 N. W. Rep. 850.

We are of opinion that we can not properly interfere with

the verdict upon the grounds urged by the appellant, for if it can be reasonably said that the condition of the spark arrester and the conduct of the engineer were all the law requires, as to which there is ample room for serious contest, still there is evidence to show negligence in allowing the right of way, if it may be so termed, to become foul with dry grass and dangerous to adjoining property.

Appellant objects to the damages allowed by the verdict and to various items of testimony admitted by the court to the jury. After considering all these, and without taking time to state them in detail, we may say we find no error of substance. The verdict is clearly within the range of the proof properly bearing upon the point. It was for the jury to make the most satisfactory estimate in their power in view of the proof, and we think appellant has not demonstrated that the conclusion reached in this respect is so erroneous as to justify a reversal.

It is urged the court erred in admitting evidence that this engine threw sparks at other points and set several fires along the route before reaching the canning factory. In this there was no error, as has frequently been held.

It is urged as error that witnesses were allowed to designate by marks on a plat where the fire originated, or where they first saw it, and refused to permit proof that a day or two before boys were seen making bonfires at some point not very far distant from the factory. We see no error in these rulings, nor in others of which complaint is made, and which need not be more specifically stated.

It is urged that there was a fatal variance in this, that the declaration alleged the plaintiffs' property was situated on block No. 46, and the proof showed that a part of the structure extended four or five feet beyond the block named. The first count did so state the location of the property; other counts did not. The defendant stipulated by an admission made at the opening of the trial that it owned and operated the railroad in question and that the property of plaintiffs was situated on block 46, as alleged. The objection is untenable.

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Various objections are urged as to the rulings of the court in reference to the instructions. The chief matters so complained of are involved in the points already noticed.

It is suggested that by the 11th given for plaintiff, the jury were authorized to allow for the value of the property and for the damages thereto. The instruction appears inaptly worded and probably some qualifying term was inadvertently omitted, but we think the jury were not misled by it, especially in view of the 8th and 9th, given for defendant, and in view of the verdict, which certainly is not based upon such an estimate as counsel argue this instruction would warrant.

We think it not necessary to follow the extended criticism as to other instructions. After having carefully read the whole series as given, some having been modified by the court, we find nothing of which the appellant can make serious complaint. We are of opinion that the law was announced with sufficient favor to appellant.

The record is voluminous, and many objections were raised and overruled during the protracted trial. While there may be some technical errors in these rulings, yet we think there is nothing that so prejudiced the appellant as to require another trial. The judgment will therefore be affirmed.

**Charles Bogardus, Francis Meharry, H. H. Atwood and
C. H. Yeomans, v. The People of the State of
Illinois, for use of the County of Ford.**

1. *SURETIES—On Official Bond—Measure of Liability.*—The sureties on a bond can not be held for the malfeasance of the principal occurring during a previous term of office.

Memorandum.—Debt on official bond. Appeal from the Circuit Court of Ford County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed December 8, 1893.

The opinion states the case.

ALFRED SAMPLE, C. H. YEOMANS, E. C. GRAY, and J. H. MOFFETT, attorneys for appellants.

COOK & MOFFETT, attorneys for appellees.

PER CURIAM.

This was an action on the bond of Merton Dunlap, as county clerk, for the term beginning December 1, 1890.

He was removed from office May 5, 1892. The sureties on this bond can not be held for the malfeasance of the principal accruing during his previous term of office, yet we find included in this judgment the sum of \$428.05 for money improperly drawn by him prior to the date of this bond.

At least, such we understand to be the true meaning and force of the sixth stipulation, upon which the claim for unauthorized orders, issued to third parties, is based. Were the first clause of the stipulation to be considered alone, it would be clear enough that the money was obtained by the clerk during the term covered by this bond; but the final clause, which is not only the later, but the more specific statement, is conclusive against the plaintiffs.

It is urged that this is a mere clerical mistake and that it was not intended that the stipulation should be so construed. Perhaps it is so, but we can rely upon the record only as we find it, and upon the suggestion that the stipulation is not what it was intended to be, we will remand the case for another trial, and will not enter judgment here for the balance, as we might otherwise do.

Appellants urge that the orders, No. 8125 and 8127, which were issued to Dunlap without specific authority, were authorized by the general resolutions of the board, in reference to the payment of the notes of the county. These orders cover more than the amount claimed for unauthorized orders to Dunlap, and it should also be observed that the general resolutions do not provide for orders to be issued to Dunlap. Indeed it is not stated who were the holders of the notes, and so it is not apparent to whom the orders on that account were to be issued.

It is insisted by counsel for appellee that the testimony of

McNeer v. Boone.

Sims makes the point clear, that the unauthorized orders referred to in the third and fourth stipulations did not include these. The schedules which he refers to as having been prepared by him, are not in the record, nor do we think it is competent for him to determine what was authorized and what not. As an expert he might give the result of his examinations upon a certain theory or hypothesis, but so far as he assumes to determine whether the resolutions of the board were authority for the clerk's action in a particular instance, his evidence was incompetent, and being objected to, was presumably disregarded by the court. We do not decide whether as to these two orders the position of appellants is well taken, because we must reverse the case for the reason the judgment includes the item of \$428.05, and because, as we suppose, whatever difficulty there is as to these matters can be obviated when the case is again tried.

The judgment will be reversed and the cause remanded.

Valentine C. McNeer v. Charles Boone.

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57 65

1. **FENCES**—*What an Owner of Stock May Rely Upon.*—An owner of stock has no legal right to rely upon the sufficiency of the fence of another to restrain his stock, unless it is a partition fence, the defective portion of which has been assigned to such person to maintain.

2. **ANIMALS**—*Owner Bound to Restrain at Common Law.*—It is the duty of the owner of stock, under the common law rule, to keep it on his own premises. When it escapes to the premises of another, it is a trespasser, and the owner of such premises is under no obligation to keep wells thereon and such places covered to secure its safety.

Memorandum.—Case; judgment on demurrer to declaration. Error to the Circuit Court of Douglas County; the Hon. EDMUND P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed.

The opinion states the case.

ECKHART & MOORE, attorneys for plaintiff in error.

J. M. NEWMAN, attorney for defendant in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

A demurrer was sustained to the declaration in this, an action on the case brought by McNeer against Boone. The correctness of the ruling of the Circuit Court in this respect is the only question here presented.

The declaration alleged that McNeer was the owner of a colt which was being pastured by James Smith. That Boone had possession of a pasture adjoining that of Smith, in which he (Boone) had a herd of cattle. That the pasture fields were divided by a "good and sufficient fence," and that Boone's cattle broke down the fence, so that the colt passed through it into Boone's pasture, and strayed to and fell into a well in that pasture, and was killed by reason of the failure of Boone to properly cover the mouth of the well.

It is not averred that the fence was a partition fence either by agreement or under the statute. Construing the pleading most strongly against the pleader it is to be presumed that it was not a partition fence. It is consistent with the declaration that it may have been wholly the fence of the defendant.

That being true, the plaintiff had no right to rely upon it as a means of securing the colt within Smith's pasture. His duty was to keep the colt upon his own premises, and he had no legal reason to rely upon the sufficiency of the fence of another to restrain his colt, unless it was a partition fence, the defective portion of which had been assigned to such other person to maintain. *McCormack v. Tate*, 20 Ill. 331; *McBride v. Lynn*, 55 Ill. 411.

It is urged that Boone was required to keep his cattle within his own inclosure, and that he was, by the common law rule in force in Douglas county, answerable for the trespasses of his stock.

True, but there is no averment that his cattle trespassed upon or damaged the property of the plaintiff. At most it only amounts to a charge that defendant's cattle broke down the defendant's fence, so that the colt of the plaintiff escaped

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from Smith's pasture and was killed. If the fence did not belong to Smith or the plaintiff, and was not a partition fence, what reason has the plaintiff to complain that it was not maintained? The declaration fails to show that the plaintiff, or Smith, his representative, had any legal right to rely upon the fence as a means of keeping the colt in the pasture of Smith. Their duty was, under the common law rule, to keep the colt on their premises. When it escaped to the premises of the defendant it was a trespasser, and the defendant was under no obligation to keep the mouth of the well covered to secure its safety.

The judgment must be and is affirmed.

W. Scott Barry v. The Coffeen Coal & Copper Co.

52	183
105	241

1. CORPORATIONS—*Compensation of Officers*.—An officer of a corporation can not recover for services rendered upon an implied contract.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

APPELLANT'S BRIEF, AMOS MILLER AND W. A. HOWETT,
ATTORNEYS.

An officer may recover on a *quantum meruit* compensation for services beyond the duties of his office. Beach on Private Corporations, 343, 355, 356 and 391; Edwards v. Fargo & Co. S. Ry. Co. (Dak.), 32 N. W. Rep. 100; Cheeney v. L. B. & M. R. W. Co., 68 Ill. 570 and cases cited; R. R. I. & St. L. R. R. Co. v. Sage, 65 Ill. 332; Hall v. The O. & M. R. R. Co., 28 Vt. 401; Ten Eyck v. P. O. & P. R. Co. (Mich.), 41 N. W. Rep. 905; New Orleans, B. R. & Packet Co. v. Brown, 36 La. An. 138.

LANE & COOPER, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by appellant to recover *quantum meruit* for services rendered while he was the president and a director of the company, but claimed to have been out of the scope of his duties, as prescribed by the by-laws or pertaining to his office, and two small items, \$14, paid for his traveling expenses, and \$6 for one hundred props furnished. Non-assumpsit was the only plea. By agreement the case was heard by the court without a jury. No propositions of law were submitted to be held. Finding and judgment for the defendant. Plaintiff, having made the usual motions, which were overruled, and exceptions taken, appealed from that judgment.

The claim for services was for twenty months at \$60 per month, and of its disallowance the only complaint made is that it was against the evidence. That evidence, in brief, is that in the early part of February, 1889, when the shaft had been sunk and the coal reached, at a meeting of the directors, where they were talking of the kind of machinery, head-gear, etc., they would have to equip the mine, but had come to no definite conclusion in relation to it, Mr. Coffeen, one of the members, said: "I propose that we turn this matter over to Scott Barry, and let him go ahead and equip the mine, get the machinery, build the head-gear to suit himself, and go on and equip it, and whatever he does in this matter will be satisfactory to us," to which no objection was made. Nothing was then said about compensation to him, nor was any record made of the action thus taken, nor any other special authority in relation to it given to him. He went on and contracted for the machinery, brick, lumber and other material required, and superintended the work of construction and equipment.

His authority to bind the company for machinery and material furnished and labor performed by third parties for and in such work is not questioned. But did he thereby acquire, as against it, a legal right to compensation for his own services? The by-laws did not prescribe his duties

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particularly. Its provision was: "He shall have a general supervision of the business and affairs of the company." The power thus conferred imposed the duty to exercise it, so far as the interest of the company required. The equipment of the mine was clearly among the business affairs of the company. It was to be provided for and accomplished by the board of directors as a body, or through a committee or member of the board, or such special agency as they might see fit to employ. It involved the expenditure of a large amount of money of the company, as to which they were trustees and custodians, with power to disburse it, and full responsibility therefor. They saw fit to devolve the duty upon their president, who was also a director, with his consent. The informality of their action, making no record of it, nor any provision or agreement for compensation to him, tends to show that neither they nor he regarded it as an appointment of a special agent. His authority as president and director was ample and sufficient without a special appointment, and it must be presumed that he acted upon that authority. They and he chose to regard it as part of his duty as such president and director, and not otherwise. *Holden v. L. B. & M. Ry. Co.*, 71 Ill. 106; *Gridley v. Same*, *Ibid.* 200; *Cheeney v. The Same*, 68 Id. 570. These authorities hold that in such case the officer can not recover upon an implied contract.

There was also evidence strongly tending to show that appellant did not intend to claim for these services, and the court below might have based his finding upon it.

Other evidence was to the effect that for the traveling expenses he received payment in coal, and that the props claimed for, were not of the kind that the company purchased and were wholly worthless.

On the whole we approve the judgment, and it will be affirmed.

Lorenzo Bull and Wm. B. Bull, Partners, v. The City of Quincy.

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1. **MISTAKE OF FACT—*Money Paid Under.***—Money paid under a mistake of fact, induced by fraud or misrepresentation, may be recovered back in an action at law.

2. **ACCOUNT STATED—*Auditing Bills Induced by Fraud.***—Where the auditing of accounts by a city council is brought about by fraud of the claimant, the action of the council is not conclusive upon the city.

Memorandum.—Assumpsit to recover back money paid by mistake. Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 4, 1893.

The opinion states the case.

APPELLANTS' BRIEF, BERRY, O'HARRA & SCOFIELD, ATTORNEYS.

In case of a voluntary payment by mere mistake of law, no action will lie to recover back the money. The construction of the law is open to both parties, and each is supposed to know it. *Elliott v. Swartout*, 10 Pet. (U. S.) 137; *Morgan v. Palmer*, 2 Barn. & Cress. 729; *Brisbain v. Dacres*, 5 Taunt. 154; *Bromley v. Holland*, 7 Vesey 23.

In the absence of fraud the body who is given the power to allow claims, when they have officially passed upon a claim, must be conclusively presumed to have had at the time, full knowledge of all the facts pertaining thereto, which a proper investigation would then have disclosed. *Advertiser and Tribune Co. v. City of Detroit*, 43 Mich. 116; cited and approved in *The County of Wayne v. James A. Randall*, Id. 137, and in *McArthur v. Luce et al.*, Id. 435.

APPELLEE'S BRIEF H. M. SWOPE AND SPRIGG, ANDERSON & VANDEVENTER, ATTORNEYS.

Money paid under mistake of fact as to the sum due may be recovered in assumpsit for money had and received. *Frambers et al. v. Risk*, 2 Brad. 499; *Devine v. Edwards*,

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101 Ill. 138; Stempel v. Thomas, 89 Ill. 146; Maxwell v. Longenecker, 82 Ill. 308; Bradford v. Chicago, 25 Ill. 349; Bierdslee v. Horton, 3 Mich. 560; Little v. Derby, 7 Mich. 325.

The strongest cases for application of this rule are where the information rests upon the payee, is unknown to him who pays, and mistake of the latter arises from failure to disclose or misrepresentation by the former. *People v. Foster*, 133 Ill. 516; *Sands v. Sands*, 112 Ill. 225; *Wheeler v. Smith*, 9 How. 55.

And where the relations are such that the party deceived is dependent upon the party deceiving, a court of equity will interfere in a mere mistake as to the law. *Bispham's Principles of Eq.* (2d Ed.) Sec. 188; *Kerr on Fraud & Mistake*, (Bump's Ed.) 400.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the city in an action of assumpsit brought by it against the appellants to recover a sum of money alleged to have been overpaid to the appellants for the cost of certain hydrants and setting the same. The hydrants were furnished and set by the appellants under the terms and provisions of a contract between the city and the firm of Bull, Prince & Bull, which contract had been assigned to the appellants, who succeeded said firm with whom it was made. We had occasion in the case of *Bull, Prince & Bull v. the appellee city* to construe this contract, and held, in an opinion by Mr. Justice Wall, not yet reported, that the city was only required by the contract to pay for each hydrant the actual expense to the contractors of procuring and setting the same, without any profit to the contractors. A re-examination of the contract made in the case at bar has only served to confirm our former conclusion as to its proper construction and meaning in this respect. The appellants succeeded only to the rights of Bull, Prince & Bull under the contract. They presented to the city council at different times bills for hydrants placed or set by them

at a uniform rate of \$75 for each hydrant. These bills were paid by the city, and this action was brought to recover an alleged difference between the actual cost of the hydrants and the sum thus paid by the city for them. A jury was waived and the cause submitted to the court. The court found from the evidence that the amount of \$75 paid for each hydrant, included a profit to the appellants of \$25 on each of them, and rendered the judgment appealed from, on the theory that under the contract the appellant was not entitled to receive any amount by way of profit and should repay to the city the amount so overpaid.

The appellants, though contending for a construction of the contract from its language alone, different from that adopted by the court, insist that the acts of the parties under the contract should be resorted to, to determine in the most satisfactory manner the true intention which they had in view when entering into the same. The city council audited the bills of the appellant from time to time, allowing the sum of \$75 for each hydrant and for setting the same. This, appellants counsel insists, ought to be accepted as showing the intention and understanding of the parties when making the contract. The fallacy of this insistence is, that it seems clear from the evidence, that the city council did not know that the sum demanded by the appellants and paid for the hydrants included anything to the appellants by way of profit. Had the appellants itemized the bills so that the city council would and ought to have known that the total sum asked by the appellants for a hydrant included a profit thereon, then payment would justly have been regarded as strong evidence that the parties so intended the contract to be understood when it was entered into. The appellants, however, gave no such information, but upon the contrary, asked for a sum total for each hydrant and for setting the same. Their conduct in this regard is open to the imputation that this practice was adopted in order that the question as to their rights to such profit should not arise. Under such circumstances the action of the council in auditing and paying the bills for the hydrants, does not at all aid in the construction of the contract.

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The appellants urge that even under the construction given the contract the judgment should be reversed.

1st. Because the overpayments sought to be recovered were voluntarily made by mere mistake of law, and for that reason can not be recovered by action at law.

2d. That the city council had power to audit and allow or investigate and reject the claim presented by the appellants, and that the council could not allow such claims without investigation and pay them, and then seek to recover the amount paid, or part thereof, because of facts existing, but not known at the time the account was allowed and paid, but which could and would have been ascertained by the council had they reasonably examined into and investigated the claims when presented. As to the first of these reasons for reversal, it is sufficient to say that these payments were not made under a mistake of law, but of fact.

The city council supposed the total amount demanded by the appellants for each hydrant and for setting the same was the cost and expense thereof. In this it was mistaken, for, in point of fact, the total included a sum in excess of such cost and expense.

As to the second ground urged against the judgment, the rule of law invoked by the appellant is not applicable when the action of the council is brought about by the fraud of the claimant. So it is distinctly ruled in *Advertiser and Tribune Co. v. City of Detroit*, 43 Mich. 116, cited by the appellants as the authority relied upon by them to support the principle upon which their contention rests.

The first and second propositions of law held by the court in the case at bar are as follows:

1st. On behalf of the defendants, the court is requested to declare the law to be, that under the law it is the duty of the city council of Quincy, Illinois, to allow or refuse to allow claims presented against said city; that said council can not formally allow claims without investigation and rescind their action, and recover back money paid because of facts existing, but not known at the time the claim was

allowed, and which a proper examination would then have brought to their attention. In the absence of fraud or misrepresentation, the body which is given power to allow claims, when they have officially passed upon a claim, must be conclusively presumed to have had at the time full knowledge of all the facts pertaining thereto, which a proper investigation would have disclosed.

2d. That the law presumes that the city council of Quincy investigated each claim for hydrants against said city by the defendants, or by any one or more of them; and the law presumes that the said council examined into the justice of each of said claims and the liability of the city thereon, and the law presumes that if said council allowed said claims, or any of them, it was done advisedly and with knowledge of their justice or injustice; that payments so made are voluntarily paid and can not be recovered back in this case, in whole or in part, unless said payment or payments were made under a mistake of fact, induced by fraud or misrepresentation by defendants, or some one or more of them.

Entertaining such opinion as to the proper rule of law applicable to the case, it is clear that the court could have rendered judgment for the plaintiff below, only upon a finding from the evidence that the action of the council was induced by the fraud or misrepresentations of the appellants, or some one of them. The evidence certainly tended strongly to support such a conclusion, and was quite sufficient in our view to put it beyond our power to say that the finding is manifestly wrong.

The overpayments having been brought about by the fraud of the appellants, the court properly rendered judgment for the city and it is affirmed.

**James Ryan, T. Hickey and A. J. Penartz v. Otto Miller,
Surviving Partner of Herman Elshoff, Deceased,
Late Partners as Elshoff & Miller.**

52	191
153*	138
53	191
84	287

1. **MEASURE OF DAMAGES—Part Performance of Contract.**—The measure of damages where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, is the difference between the price agreed to be paid and what it would have cost to complete it.

2. **BURDEN OF PROOF—Recovery for Part Performance.**—In an action brought by a builder for a breach of a building contract, the plaintiff, after having proven the contract, its breach and the difference between the contract price and the cost to perform the work, may rest. His recovery, so far as it rests upon loss of wages, may, however, be reduced by the defendant, by showing that the plaintiff did earn or could have earned wages at similar employment had he diligently endeavored to secure the same, and the defendant may also obtain a deduction by showing that the construction of the building involved care, risk and responsibility, and that the money value thereof can be estimated from evidence produced.

Memorandum.—Assumpsit on a building contract. Appeal from the Circuit Court of Sangamon County; the Hon. JESSE J. PHILLIPS, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 22, 1893.

The opinion states the case.

APPELLANTS' BRIEF, LEVI DAVIS, JR., AND BROWN, WHEELER & BROWN, ATTORNEYS.

Appellants contended that the rule as announced by the courts and embodied in the first proposition of law (see opinion) asked by them in the court below, is founded upon reason, and should have been marked "*Held.*"

In support of this they cite the following cases: *Master-son v. Mayor of Brooklyn*, 7 Hill (N. Y.), 71; *United States v. Speed*, 8 Wall. (U. S.) 77; *United States v. Behan*, 110 U. S. 338; *Insley v. Shepard*, 31 Fed. Rep. 869.

APPELLEE'S BRIEF, CONKLING & GROUT, ATTORNEYS.

As much force should be given to the finding of the court as the verdict of a jury. *Cook v. Thayer*, 11 Ill. 617; *Wood*

v. Price, 46 Ill. 435; Field v. C. & R. I. R. R. Co., 71 Ill. 461.

Propositions of law, like instructions, should be pertinent to the proofs, and when not warranted by proof should be refused. Wadhams v. Swan, 109 Ill. 55.

To secure any deduction for time saved by appellee, appellant must produce evidence; without evidence this is *prima facie* against appellant. Brown v. Board of Education, 29 Ill. App. 572; School Dist. No. 4 v. Stilley, 36 Ill. App. 133; Howard v. Daly, 61 N. Y. 362; Costigan v. Mohawk and H. R. R. Co., 2 Denio, 609; Oldham v. Kerchner, 28 Am. Rep. 308 and note.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

In September, 1891, the firm of which the appellee is the surviving member, entered into a contract with the appellants to furnish material and perform the work necessary to the construction and completion of a residence for the Right Rev. James Ryan, bishop of Alton, according to plans and specifications agreed upon by the contracting parties, for the sum of \$25,964. The appellee firm entered into subcontracts with several parties for material to be used in the building, caused necessary excavations to be made, put in sewers and connections with the water mains, and made preparations toward the further performance of the contract upon their part, when the appellants, without any sufficient cause or reason attributable to the appellee, directed the appellee to stop the work and refused to proceed further in the construction of the house. This was an action by the appellee, Miller, as surviving member of the firm, to recover damages for such breach of the contract.

Trial of the cause had by consent before the court without a jury, resulted in a judgment against the appellants in the sum of \$2,657, to reverse which this appeal is before us. The appellants, before the beginning of the action, recompensed the appellee firm for all work actually done, and reimbursed them for all outlays, except, perhaps, as to

an item of \$60, paid by the appellee for a vault door. The claim of the appellee for damages consisted of loss of anticipated profits, which they alleged would have accrued to them from the performance of the work under the terms and conditions of the contract. As to such profits much evidence *pro et con* was submitted to the trial judge. Counsel for the parties have filed exhaustive briefs and arguments in support of the views respectively entertained by them as to the weight and value of such evidence and the facts established or refuted thereby. We have attentively read and considered all that counsel have said in the briefs and arguments, and have carefully consulted the testimony as presented in the abstract and preserved in the record. The evidence consists largely of the estimates of witnesses as to the amount, quality and value of the different kinds of material necessary to be used in the construction of such a building as that described in the plans and specifications, and also as to the cost of erecting and completing the proposed house, and the profits that would have been realized by the appellee had they been allowed to proceed with the work. The evidence is conflicting. In its nature it could hardly be otherwise.

The opportunity accorded the trial judge of seeing and hearing the witnesses, not only enabled him to determine better than can we as to their credibility, but gave him superior advantages in deciding from their personal appearance and their manner and deportment, as to the soundness of their judgment, their mental strength and consequent ability to rightly consider and comprehend all the elements of fact that necessarily entered into the estimates and conclusions which constituted so largely the testimony in the case.

Upon well settled principles we are not warranted in saying that the trial court erred in its judgment as to the facts established by the evidence. We have examined the complaints that the court erroneously admitted in evidence p. 177 of Vredenburg's estimate book, and refused to permit the witness Thos. White to give an opinion as to the certainty

with which any calculation of profit upon a common piece of work could be made. The page of the book was properly admissible in connection with the testimony of the witness Vredenburg. The witness White testified at length to facts and circumstances within his knowledge as a competent and experienced brick mason and contractor, much of which tended to show and was competent only for the purpose of showing that all calculations as to the possible profits upon such work were necessarily and in their nature uncertain. The question propounded to him called for his opinion in view of all that he testified to, and was for that reason not material, it being the province of the court to draw the conclusions that ought to arise from his testimony.

The appellants urge that the court entertained an erroneous opinion as to the rule of law applicable to one branch of their contention. They asked and the court refused to hold the following proposition of law:

"1st. The measure of damages in this case is the difference between the cost of doing the work and furnishing the material, and what the plaintiffs were to receive therefor, making a reasonable deduction for the less time the plaintiffs were engaged, by reason of the defendants refusing to allow them to complete the contract, and also a reasonable deduction for the release of the plaintiffs from the care, trouble, risk and responsibility attending a full execution of the contract."

We do not understand that the proposition states the rule correctly. The measure of damages, where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, is the difference between the price agreed to be paid and what it would have cost to complete it. 2 Sedgwick on Damages, Sec. 618.

The plaintiff, after having proven the contract, its breach, and the difference between the contract price and the cost to perform the work, may rest. His recovery, so far as it rests upon loss of wages, may, however, be reduced by the defendant by showing that the plaintiff did earn or could have earned wages at similar employment had he diligently

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endeavored to secure such work, and in cases such as the one at bar the defendant might obtain a deduction by showing that the construction of the building involved care, risk and responsibility, and that the money value thereof can be estimated from evidence produced.

The appellants introduced no proof tending to show that such contractors did or could have otherwise employed their time, or what compensation they did or might have received or obtained during the time they were released from engaging in the work contracted to be done.

Nor is there any proof from which an estimate could be made of the amount that ought to be allowed as a deduction because of the release of the appellees from the risk and responsibility that would have attended the execution of the contract. The court could not act as to such reductions upon mere presumption, but only upon proof.

The alleged matters proper to be considered in reduction of damages do not affect the right of action but go only in reduction of damages.

Hence, the burden of proving them is upon the defendant. 2 Sedgwick on Damages, Sec. 667; Oldham v. Kerchner, 28 Am. Rep. 308, and authorities collated in note to the case; Costigan v. M. H. R. R. Co., 2 Denio, 609. The proposition submitted to the court was open to the objection that it imposed the burden of proof improperly upon the appellee, and moreover there was no proof upon which to rest or apply it. For either of these reasons it might have been properly refused.

Believing that there is no such error in the record as requires the reversal of the judgment, it is affirmed.

John J. Alexander v. Sarah L. Alexander.

1. PROPOSITIONS OF LAW—*Must Present Questions of Law.*—Where a proposition is not purely one of law, but rather in the nature of proposition of fact, it is properly refused.

2. TRIAL BY THE COURT—*How Regarded on Appeal.*—The finding of

59	195
84	182
52	195
100	2684
52	195
104	1154

the court is to be regarded with the same favor as the verdict of a jury, and the same presumptions will be indulged in order to support it.

3. **USE AND OCCUPATION—*Contract to Pay Rent Must be Inferred.***—Assumpsit for use and occupation can not be maintained without a contract, express or implied, showing the relation of landlord and tenant to exist, yet a contract to pay rent may be inferred from the mere occupancy of premises, unless the character of the occupancy is such as to negative the idea of tenancy.

4. **HOMESTEADS—*When the Husband Deserts the Wife.***—When the husband, being the owner of the fee of the homestead premises, deserts his wife, the right which the law devolves upon the wife is an exclusive estate, which she may enjoy without interference from her delinquent husband.

5. **HOMESTEAD—*Deserted Wife Entitled to Rent.***—Where a wife, deserted by her husband, remains in the occupancy of the homestead, she will be entitled to the rents, and if a tenant pays the husband the rents accruing during the period of her exclusive right of enjoyment, it will be no bar to her demand for it from such tenant.

6. **LANDLORD AND TENANT—*Liability to Pay Rent.***—Where a person is in the possession of premises without any express contract of leasing with anybody, yet is, in fact, a tenant and not a trespasser, the law will imply a liability to pay rent to the party legally entitled to it.

7. **HUSBAND AND WIFE—*Homestead Rights.***—Where a husband deserts his wife, she becomes entitled to the rents of the homestead occupied by her previous to the desertion, and a part of it being in the occupancy of a tenant, she may maintain an action for the rents, or maintain trespass or forcible detainer against an intruder upon her possession.

Memorandum.—Action for use and occupation. Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

STATEMENT OF THE CASE.

This action was brought before a justice of the peace to recover rent for the use of a storeroom. The plaintiff recovered and the defendant appealed to the Circuit Court, where, by agreement, a jury was waived and the cause submitted to the court upon the following agreed state of facts, viz:

That J. J. Alexander, Jr., son of defendant, was engaged, in Fillmore, Montgomery county, Illinois, in the mercantile business, in a house with two stories, situated on lot two (2) in block two (2) in said town. That in the upper story

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he lived with his wife and child, and occupied the same as a homestead. That in the lower story he had his store and stock of goods. That there was an outside stairway from the upper story and an inside stairway that came down through the storeroom, and was used by the family to go down and through the storeroom into the back yard to the cistern, and for other purposes, and said premises were worth less than \$1,000.

That J. J. Alexander, Jr., husband of plaintiff, left home about the last of October, 1891, without informing his wife or other persons of his destination; went to Arkansas and stayed two weeks; returned to the neighborhood of Fillmore for a few days; did not visit his store or family, and again left for Arkansas, and returned again with a bunch of cattle bought for his brother, and did not visit his family, and never has returned to them.

That he had in his employ one Hoyt, as clerk, when he left the first time, and was largely in debt to divers persons, and also to the defendant, his father. He left instructions with Hoyt to sell his stock of goods if he had an opportunity. Hoyt sold the stock of goods to defendant, and defendant took possession of the goods and storeroom and has remained in possession of said store up to the time of the commencement of this suit. That defendant never rented said storeroom from any one, and never agreed to pay the plaintiff any rent. That the plaintiff remained in said upstairs rooms for about two months after her husband left the first time, then temporarily moved to her father's, but left in the upstairs of said building, her personal effects. That plaintiff demanded the rent for said storeroom before beginning suit. That J. J. Alexander, Jr., when he returned the last time has remained at Fillmore, but has never resided with or provided in any way for his wife and child.

That about the time of the commencement of this suit the defendant paid J. J. Alexander the sum of one hundred and thirteen dollars (\$113) as the rent on said storeroom for the time and as amount due at the beginning of this suit, and after plaintiff had demanded it from defendant, by

crediting J. J. Alexander on his indebtedness. It is further agreed that said J. J. Alexander, Jr., was the owner of said lot two (2) in block two (2) and the building thereon, in October, 1891, when he went the first time to Arkansas, and continued to be the owner thereof up to the commencement of this suit, and also owned said stock of goods until they were sold to the defendant, and was head of the family when he resided with the same. And it is also agreed that if the court finds for plaintiff the judgment shall be for \$108, the amount recovered before the justice of the peace.

And this being all the evidence offered by either party, the defendant asked the court to hold the following propositions of law as the law of this case:

4. (Held.) That the action for use and occupation is founded upon contract and will only lie where there is a contract, express or implied.

Defendant, also, then and there moved the court to hold the following propositions of law to be the law of this case:

1. (Refused.) The court holds the law to be that before the plaintiff can recover in this case, the proof must show that the relation of landlord and tenant existed between the plaintiff and the defendant.

2. (Refused.) The court holds that the evidence in this case failing to show that the relation of landlord and tenant existed between the parties there can be no recovery by plaintiff.

3. (Refused.) The court holds that before there can be a recovery in action for rent, the evidence must show a contract, either express or implied, to pay rent.

5. (Refused.) The court holds that the evidence in this case fails to show any contract, express or implied, on part of the defendant, to pay plaintiff rent for the premises in question, and therefore plaintiff can not recover.

But the court refused to so hold and the defendant excepted, and the court rendered judgment for plaintiff and defendant excepted.

By the appeal of defendant the record is brought to this court and the case is presented upon the following:

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ASSIGNMENT OF ERRORS.

1. The judgment of the court is contrary to the law and the facts.
2. The court erred in not granting a new trial.
3. The court erred in not holding the propositions of law submitted by the defendant, and each and every one of them were the law of this case.
4. The judgment is contrary to the fourth proposition of law as held by the court.

LANE & COOPER, attorneys for appellant.

JAMES M. TRUITT, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The third assignment of error relates to the action of the court in refusing propositions of law. The principle contained in the first and third propositions was substantially and sufficiently announced in the fourth, which was held. The second and fifth were not propositions of law purely, but were rather in the nature of propositions of fact and were properly refused for that reason.

The first, second and fourth assignments of error may be considered together, and they present the single question, whether, upon the agreed facts, the plaintiff was entitled to recover.

The finding of the court is to be regarded with the same favor as the verdict of a jury, and the same presumptions will be indulged in order to support it. While it is true that assumpsit for use and occupation can not be maintained without a contract, express or implied, showing the relation of landlord and tenant to exist, yet a contract to pay rent may be inferred from the mere occupancy of premises unless the character of the occupancy is such as to negative the idea of tenancy. Wood on Landlord & Tenant, 8; Oakes v. Oakes, 16 Ill. 106. It may, therefore, be assumed that under the proofs the court was warranted in holding that appellant was the tenant of either the appellee or of her

husband, and so the question is, which of these was by law entitled to claim the rent.

It may further be assumed without difficulty that there was sufficient evidence to justify the conclusion that the husband had deserted the family; that the building in which the store room was contained was the family homestead, and that it was of the value of less than one thousand dollars. The inquiry is then narrowed down to the effect of such desertion.

Did it devolve upon the wife the right to enjoy the rents? It has been settled by repeated decisions that the amendment to the homestead law, passed in 1873, produced a radical change in the character of the homestead right and enlarged it to an estate. It is no longer a *mere* exemption. *Browning v. Harris*, 99 Ill. 456. By Sec. 2 of the act it is provided that "such exemption shall continue after the death of the householder for the benefit of the husband or wife surviving, as long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age, and in case the husband or wife shall desert his or her family, the exemption shall continue in favor of the one occupying the premises as a resident."

Although in this section the word "exemption" is used to designate the right referred to, yet the Supreme Court have treated the section, so far as the character of the right is concerned, as intending and contemplating the same thing as the first section, which enlarges the right to an estate. There would have been a gross want of harmony in the law with a construction which gave an estate to the husband while living, and the head of the family, but devolved a mere exemption upon the wife in case of his death or desertion. Moreover, such a construction would have defeated one of the expressed objects of the change, that is to protect the surviving husband or wife against partition proceedings.

In *Browning v. Harris*, *supra*, it was said that when the head of a family having an estate in fee in the homestead

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premises dies, and the right of homestead is devolved upon the surviving wife by operation of law, a life estate is carved out of the fee for the purpose of such estate of homestead, and the heirs take a reversion in fee only expectant upon the termination of such life estate. In *Rendleman v. Rendleman*, 118 Ill. 257, it appeared that the husband had deserted the wife, and in discussing the rights of the wife in the homestead premises, the court remarked: "The wife having thus become the head of the family, the law at once clothed her with a right of homestead in the same premises. This right of homestead is expressly declared by the legislature to be an estate in the lot of ground and building to which the right attaches. Like all other estates it must be supported by a title. This title may be in fee, for life, or even for years, in the case of an extended term. In all cases the title must be either in the owner of the homestead right or in one who sustains or has sustained some special relation to such owner, or in the assignee of one sustaining or having sustained such special relation to the owner. The relations here alluded to are, of course, those of husband and wife and parent and child. With respect to the former it is unimportant whether the title to the homestead premises is in the husband or in the wife. Whether in the one or the other, the holder of the title can not deprive the other of the enjoyment of the homestead premises. Thus it is expressly provided by the second section of the act that in case the husband or wife shall desert his or her family, the exemption shall continue in favor of the one occupying the premises as a residence."

From the view thus taken, it must follow as a logical consequence that when the husband, being the owner of the fee of the homestead premises, deserts his wife, the right which the law devolves upon the wife is an exclusive estate which she may enjoy without interference from her delinquent husband.

If a tenant should pay the husband for rent accruing during the period of her exclusive right of enjoyment it would be no bar to her demand. In this case it is conceded by

counsel for appellant that while the latter had no express contract of leasing with anybody, yet he was, in fact, a tenant and not a trespasser; that is, that the law would imply a liability to pay rent to the party legally entitled to claim it.

The only pretense of payment here was that after the appellee demanded the rent the appellant credited the amount upon the indebtedness of the husband, and that without consulting him.

The case of Dudding v. Hill, 15 Ill. 61, relied on by appellant, is not in point because the facts are unlike those in the case at bar. Dudding had bought the property under execution against the husband, who died in possession. Afterward the wife left the premises, intending to return, but Dudding took possession, claiming the right as owner to do so, and then Mrs. Hill brought assumpsit for use and occupation. The court said: "Dudding went into possession under a claim of title and not as the tenant of Mrs. Hill. His possession was not subservient to her title but purely of an adverse character." It may be remarked also, that the case arose before the passage of our original homestead law.

The present case is more like that of Oakes v. Oakes, *supra*. There the proof showed merely that the deceased went into possession of the plaintiff's land and occupied it for several years, and that the rental value was \$300 per annum. The Supreme Court said: "There is no evidence of an express contract for rent, nor is there any evidence that the defendant's intestate was a trespasser or intruder upon the land, or that he in any way held it against the will of the owner, nor is it shown that there was any agreement or understanding that the tenant was to enjoy the land without rent. Under such circumstances the law will imply an agreement to pay a reasonable rent for the premises."

And the court reversed the judgment, which was for defendant, because the trial court had misled the jury by an instruction to the effect that the plaintiff must prove a contract between the deceased and the plaintiff, creating the relation of landlord and tenant as for the payment of rent,

C. & O. Ry. Co. v. Radbourne.

it being thought that thereby the jury were led to suppose an express contract was necessary.

It is argued, however, in behalf of appellant, that whatever rights the appellee may have, the remedy is not at law, citing *Mix v. King*, 55 Ill. 434.

In that case the wife had been abandoned by the husband, leaving her in possession of the homestead, upon which there was a mortgage, in which the homestead was not released. Ejectment was brought by the purchaser at the mortgage sale, against the husband, and a judgment was obtained upon which a writ of possession was issued, under which the wife was put out of possession. She afterward filed her bill for an account of the rents and it was sustained. The court said she had no adequate remedy at law; that the judgment in ejectment against the husband was effective against her, and that she had no remedy by ejectment or by forcible detainer. This case, while clearly announcing the right to claim the rents, seems to support the view that remedy is not at law, but in equity, for an accounting.

It arose prior to the enactment of the amendment of 1873, by which the homestead right was raised to the dignity of an estate, which, as was said in *Browning v. Harris*, *supra*, is "carved out of the fee," and which, as we have seen, is the subject of the exclusive enjoyment of the party entitled to it, and is otherwise in its facts unlike the present case. We think it is not in point.

We see no reason why the appellee might not maintain trespass, or forcible detainer, against an intruder upon her possession, nor why she may not sue in assumpsit for the rent. The judgment will be affirmed.

52	203
87	508
88	362

Chesapeake & Ohio Railway Company v. Henry Radbourne.

1. CARRIERS OF FREIGHT—*Actions Against—Allegations and Proofs.*
—In an action against a carrier of freight, the failure to carry safely, is itself, *prima facie*, a substantive and sufficient cause of action; plaintiff

is not required to prove or allege the particular circumstances of the loss or injury.

2. **CARRIERS OF FREIGHT—Extent of Liability.**—A common carrier is bound, in the absence of a special contract limiting his liability, to much more than ordinary care. As a rule, with but few exceptions, he is an absolute insurer against loss or damage of goods in his charge, except as against the act of God or of a public enemy.

3. **CARRIERS OF FREIGHT—Defects in Means of Carrying.**—A common carrier, in accepting and using the means of carriage, by whomsoever selected and tendered, without fraud, assumes all the risks of their defects, and in the absence of a special contract, exempting him from liability, except for a failure to exercise ordinary care, proof of actual loss or damage of the goods in transit, is *prima facie* evidence of such failure and casts the burden of proof upon him.

4. **COMMON CARRIERS—First and Subsequent Carrier—Right of Action.**—Where the first carrier expressly contracts for through transportation, or without an express contract, assumes that duty, he is liable in an action on the contract or in tort, for loss or damage of the property occurring on any of the lines, and may recover over against his agent, the carrier who failed in duty. But the shipper is not bound to sue the first carrier unless he chooses, to bring his action on the contract. In that case he must, of course, sue the contracting party. If he sues in tort he may bring the action against, either the first carrier, or any other carrier who actually committed the injury.

5. **DAMAGES—Not to Exceed Amount Named in Affidavit for Attachment—Waiver.**—Where an attachment was sued out in aid of an action the affidavit and order for which fixed the damages at \$225, the recovery was for \$250. One of the grounds for a motion for a new trial was, that the amount found was excessive, and the same was assigned for error. There was evidence tending to support the finding as to the amount. *It was held*, that the attention of the court should have been called to the affidavit, so that the defect could have been cured by a remittitur; not having been done, the Appellate Court will not consider it as first presented on appeal.

Memorandum.—Action in case against a carrier of freight for failure to safely transport, etc. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 4, 1893.

The opinion states the case.

APPELLANT'S BRIEF, FRANK Y. HAMILTON AND W. H. JACKSON, ATTORNEYS.

A common carrier may, by contract, limit his liability to

such damage as may arise on his own line. In the absence of such contract the first carrier is the responsible party, and the intermediate roads his agents. No such contract was shown in this case. Ill. Cent. R. v. Frankenburg, 54 Ill. 88; Same v. Johnson, 34 Ill. 389; Adams Ex. Co. v. Wilson, 81 Ill. 339; Field v. Chicago, etc., R., 71 Ill. 458; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Wabash, etc., R. v. Jaggerman, 115 Ill. 407; Cincinnati, etc., R. v. Spratt, 2 Duval, 4.

Common carriers may make defenses to actions for damages other than the act of God or the public enemy. Hutchinson on Carriers, Sec. 221; I. & St. L. R. Co. v. Jurey, 8 Ill. App. 160; Chicago, etc., R. v. Harmon, 12 Ill. App. 54; Ill., etc., R. Co. v. Brelsford, 13 Ill. App. 251, and cases therein cited; Louisville, etc., R. Co. v. Hedger, 9 Bush (Ky.), 645; Hall v. Renfro, 3 Metc. (Ky.) 51; cases cited 3 Am. and Eng. Ency. of Law, page 7, note.

Especially is this true when the shipper selects his own cars and controls shipment of live stock. Ill. Cent. R. Co. v. Crabtree, 19 Ill. 136; Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623; St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504; Ill. Cent. R. Co. v. Hall, 58 Ill. 409; Chicago, etc., R. Co. v. Van Dressor, 22 Wis. 511; Harris v. Northern Ind. R. Co., 20 N. Y. 232; Squire v. N. Y. Cent. R. Co., 98 Mass. 239.

APPELLEE'S BRIEF; KERRICK, LUCAS & SPENCER, ATTORNEYS.

The first point, as we understand appellant's brief, is, that it was brought against the wrong party; that we should have sued the first carrier who first took possession of the horses. That might be true, if the suit were on the contract, but the action is in tort, and the action of tort may always be brought against the party who actually committed it. Had this suit been brought against an intermediate carrier, *i. e.*, one who neither contracted with appellee, nor, in fact, committed the tort, then the point made by appellant would, perhaps, be well taken; but appellant having actually injured the horses while it actually had possession of them as a common carrier, it at once became liable to the appellee for the injury and damage, and could only be excused by showing that the injury

was caused by the act of God or the public enemy. *Chicago & A. R. R. Co. v. Shea*, 66 Ill. 471; *Chicago & N. W. R. R. Co. v. Sawyer*, 69 Ill. 285; *Merchants' Dispatch v. Theilber*, 86 Ill. 71.

And the same rule applies with reference to the carrier of animals. *Illinois C. R. R. Co. v. Waters*, 41 Ill. 73; *Toledo P. & W. R. R. Co. v. Hamilton*, 76 Ill. 393; *Illinois C. R. R. Co. v. Finnigan*, 21 Ill. 646.

The injury having been caused by appellant, it is liable. *Great Western R. R. Co. v. McDonald*, 18 Ill. 172; *Adams Express Co. v. Stettauer*, 61 Ill. 184; *Hutchinson on Carriers*, Sec. 761; *Chicago & N. W. R. R. Co. v. N. L. Packet Co.*, 70 Ill. 222.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellant shipped horses from Montana to Asheville, North Carolina, in cars of his own selection for the whole trip, known as Street's stable cars. By his order they were reloaded in the Union stock yards at Cincinnati, then delivered at the Park Street yards by an engine of the Baltimore & Ohio R. R. Co. to appellant, to be transferred to the L. & N. R. R. Co. at Newport, Ky. At the latter place the employes of appellant attempted to make a running switch to throw the cars on the L. & N. side track—the engine being between them and the switch. By reason of snow on the track they stopped on the frog and had to be pushed off. For that purpose a pole was first used, but having broken, the men shoved them by hand. When they began to run freely a brakeman climbed upon them, who, finding that the first brake did not work, set the second, which broke a chain and let the cars run some two or three hundred feet and collide forcibly with cattle cars on the track. When taken back to the Covington yards to be reloaded it was found that one of appellee's horses had a broken leg, on account of which he was killed by appellant, and another a shoulder bruised and skinned.

To recover the damages so sustained this action was brought against the company, tried by a jury and resulted

in a verdict for plaintiff for \$250, on which judgment was entered after overruling defendant's motion for a new trial, from which judgment the defendant prosecutes this appeal.

It is said that the evidence does not support the finding. The abstract shows nothing of the declaration, but it is stated in argument that as originally filed it charged the attempt to make the running switch as the particular negligence from which the injury directly resulted, and insisted upon the evidence, that such attempt was not nor could have been the cause of it. In the same way it appears, however, that before final judgment the court allowed an additional count to be filed, which charged negligence only generally, in that the defendant failed to carry the horses safely according to its duty as a common carrier. Under that count the particular act of negligence that produced the failure is immaterial. The failure to carry safely is itself *prima facie* a substantive and sufficient cause of action; plaintiff is not required to prove or allege the particular circumstances of the loss or injury. Great Western R. R. Co. v. McDonald, 18 Ill. 174-5.

How or why the chain came to break, which made it impossible to check the motion of the cars or prevent the collision, which seems to have been the real cause of the injury, did not appear, and the argument based on the assumption that defendant was only bound to use ordinary care, is that the evidence wholly fails to show any want of such care on its part; that the cars were selected by the plaintiff, and the defendant could not, by the exercise of ordinary care, have known of the defect in the brake-chain.

But it does not appear, except from the fact that it broke, that there was any defect in it. And we understand the law to be, that a common carrier is bound, in the absence of a special contract limiting his liability, to much more than ordinary care; that as a rule with but few exceptions, he is an absolute insurer against loss or damage of goods in his charge, as such, except as against the act of God or of the public enemy (Adams Express Co. v. Wilson, 81 Ill. 340, where the rule is stated as so elementary that

the court refers to no authority); that in accepting and using the means of carriage, by whomsoever selected and tendered, without fraud, he assumes all the risks of their defects; and that in case of a special contract exempting him from liability, except for a failure to exercise ordinary care, actual loss or damage of the goods in transit, is *prima facie* evidence of such failure, and casts the burden of proof upon him. *Adams Express Co. v. Stattaners*, 61 Ill. 187, and authorities there cited.

In this case it did not appear nor was it claimed, that there was any special contract limiting the common law liability of defendant as a common carrier, or that the injury was due to any cause inherent in the property injured, as live stock, or to any other that is recognized as an exception to the general rule.

It is further said that in the absence of a contract limiting the carrier's liability to such damage as may arise on his own line, the first carrier is the responsible party, and the intermediate carriers his agents; and that there was no such contract shown in this case. The inference is that the action should have been brought against the carrier who received the horses in Montana.

Where the first carrier expressly contracts for through transportation, or without an express contract assumes that duty, he is liable in an action on the contract, or in tort, for loss or damage of the property occurring on any of the lines, and may recover over against his agent, the carrier who failed in duty. But the shipper is not bound to sue the first carrier unless he chooses to bring his action on the contract. In that case he must of course sue the contracting party. If he sues in tort he may bring the action against either the first carrier, or any other, who actually committed the injury. This would seem to be according to the elementary rule as to parties, and it is expressly held to be the rule in cases like this. *C. & N. W. Ry. Co. v. N. L. Packet Co.*, 70 Ill. 222-3.

Here there was evidence enough to support the finding that the injury done was on appellant's line. And upon the

facts, it is useless to consider particularly the points raised upon the instructions. They were not as discriminating as they might have been, but the greater liberality was shown to the defendant. The objections urged would have been more serious if the additional count had not been filed. Under that count, with any proper instructions, we think the verdict should have been for the plaintiff.

There was an attachment sued out in aid of the action, the affidavit and order for which fixed the damages at \$225, and the statute declares that in such case "no greater amount shall be claimed." R. S. Ch. XI, Sec. 31, S. & C. One of the grounds for the motion for a new trial was, that the amount found was excessive, and the same is assigned for error. There was evidence tending to support the finding as to the amount, and whether the attention of the court or of counsel was called to the affidavit and order for the writ of attachment, and the provision of the statute, we are not informed, but infer it was not. It could have been, and it should be presumed, would have been at once met by a remittitur. We are not disposed to consider the matter as first presented on appeal.

Judgment affirmed.

Anton Von Beeden v. W. B. Evans.

1. **EVIDENCE—*Introduction of the Instrument with which an Assault is Committed.***—Upon the trial of an action for assault and battery, where there is evidence tending to establish its identity, it is not improper to introduce the weapon with which the assault was made.

2. **ADMISSIONS—*Identity a Question for the Jury.***—Whether a statement or admission of a party has reference to the issue, is a question of fact for the determination of the jury, the duty of the court being to admit proof of the statement or admission, if there is evidence tending to show that it refers to the controversy in hearing.

3. **INSTRUCTIONS—*Stating Propositions of Law—Assuming Facts.***—An instruction stating that one charged with a deadly assault can not avail himself of the claim of necessary self-defense if the necessity for such defense was brought about by his own deliberate wrongful act, does not assume that the appellant committed a deadly assault; it only

purports to declare a principle applicable to the case of one charged with a deadly assault.

4. DAMAGES—*Elements of, in Actions for Assault and Battery.*—In an action for assault and battery, the insult and indignity inflicted upon a person by giving him a blow in anger, rudeness or insolence, constitute an element of damages.

5. DAMAGES—\$2,365 *Not Excessive.*—Where the defendant, while the plaintiff was sitting in a chair, approached secretly from behind and struck him a violent blow upon the head with a heavy chair, felling him to the ground and rendering him unconscious, \$2,365 can not be deemed excessive, when the serious character of the injuries inflicted upon the appellee, the power of the jury to award exemplary damages, and the propriety of such an award, under the proof, are all considered.

Memorandum.—Trespass. Assault and battery. In the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Declaration in trespass. Pleas, general issue and *son assault demesne*. Replication: "And as to the second plea by the defendant above pleaded, the plaintiff says, *precludi non*, because he says that defendant did not act in his own necessary self-defense in committing the injury complained of, as alleged in said plea, and of this the plaintiff puts himself upon the country," etc. Trial by jury; verdict and judgment, \$2,365 for plaintiff. Defendant appeals. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

D. H. ZEPP, RICKS & CREIGHTON, and PALMER, SHUTT & DRENNAN, attorneys for appellant.

LANE & COOPER, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was trespass to recover for an assault and battery made by appellant upon the appellee. The judgment below was for the appellee, from which this appeal. It was proven and not denied that the appellant struck the appellee upon the head with a chair. The appellant insisted that the blow was delivered in self-defense. Alleged erroneous rulings of the court upon questions of the admissibility of evidence demand attention.

Parts or pieces of a chair were, over the objection of the

appellant, exhibited to the jury, as being the same chair or pieces thereof with which the assault was made. The ground of the objection was that the chair was not sufficiently identified as being the one used by appellant on the occasion in question, and that its production was likely to prejudice the minds of the jury.

We find in the record testimony tending to establish the identity of the chair, amply sufficient to justify the action of the court in permitting its production to the jury, and that it is proper to introduce the instrument or weapon with which the evidence tends to show an assault was made, is undoubted.

One Williamson, a witness for the appellee, was allowed, over the objection of the appellant, to give in evidence a declaration made by the appellant, in a saloon at Litchfield, to the effect that he, the appellant, "had knocked hell out of them up at Nokomis." Appellant's counsel insist that it does not appear that this admission or statement had reference to the difficulty with the appellee. The name of the appellee was not used, it is true, but the assault upon him occurred at Nokomis, a few weeks previous to the conversation at Litchfield, and the words used by the appellant in their common meaning, clearly referred to the hitting or knocking of some one at Nokomis.

Whether a statement or admission of a party has reference to the issue, is a question of fact for the determination of the jury, the duty of the court being to admit proof of the statement or admission if there is evidence tending to show that it referred to the controversy in hearing.

The ruling of the court admitting the testimony was, we think, not improper. The appellant, when testifying, gave his version of the conversation or statement so alleged to have been made by him, and the jury had all attainable information upon the question, and we can not conceive that the appellant was improperly affected by the action of the court.

We have carefully read and considered the testimony upon which the jury acted, and find that the verdict is abundantly

sustained by the proof. The case made by the evidence in behalf of the appellee is that the appellant, when the appellee was sitting in a chair, approached secretly and struck him a violent blow upon the head with a heavy chair, felling him to the ground and rendering him unconscious. It was also proven that the appellant entertained strong feelings of hatred and ill will against the appellee.

The appellant admitted that he struck the blow, but insisted that he thought the appellee intended or was contemplating an assault upon him and that he struck in anticipation of danger. His version found support in the testimony of but one witness, but other evidence tended strongly to show that such witness was not present when the blow was given. The testimony of the persons who were present (if we exclude the witness just referred to, as the evidence justified the jury in doing) fully authorized the jury to accept the appellee's version of the assault. Nor do we think substantial error is to be found in the instructions.

Objections are urged to some of the instructions given in behalf of the appellee, among others the second. It states as a proposition of law that one charged with a deadly assault can not avail himself of the claim of necessary self-defense, if the necessity for such defense was brought about by his own deliberate wrongful act. It is not complained that an incorrect rule of law is announced, but it is insisted that the instruction assumes that the appellant committed a deadly assault. We think not; it only purports to declare a principle applicable to the case of one charged with a deadly assault.

Counsel for appellant erroneously suggest that the declaration does not allege that the assault was a deadly one. While this seems unimportant, yet it may not be amiss to note that the charge in the first count of the declaration is that "the appellant struck the appellee upon the head with a large and heavy chair, fracturing and injuring the plaintiff's skull in so grievous a manner that his life was despaired of," etc. It is further objected that this instruction practically advises the jury that "the only kind of self-defense of which

the appellant could avail himself is necessary self-defense; thus, it is thought, ignoring the right of defense against an apprehended apparent danger.

We do not so understand or construe it. It is only by a forced and strained construction that even an implication to that effect may be drawn. The right given the appellant by law to act in self-defense against a danger only apparent was fully made known, and so clearly stated to the jury in the instructions given for the appellant, that it would be highly unreasonable to suppose that they might have been misled as to appellant's rights in that respect by the technical and forced construction sought to be given to the instruction under consideration.

The chief objection to this instruction is that it states an abstract principle, having but little if any application to the facts of the case, for it is not contended that appellant brought on a difficulty, or by any wrongful act caused an affray, and sought to avail himself of the right of self-defense in the course of a combat.

But we do not see that a knowledge of the abstract rule would tend in any way to mislead or confuse the jury. We regard the instructions as being unnecessary but not vicious or hurtful.

The seventh instruction for the appellee is as follows:

VII. The jury are instructed that in an action of assault and battery, the insult and indignity inflicted upon a person by giving him a blow in anger, rudeness or insolence, constitute an element of damages, and in this case, if the jury believe from the evidence that the defendant committed an assault upon the plaintiff, as charged in the declaration, then the jury, in assessing damages, may consider as an aggravation of the wrong the mental suffering and mortification of feeling of the plaintiff, arising from the insult and indignity of the defendant's blow, if any such is proved.

The complaint is that this instruction directs the jury, if they believe from the evidence that the appellant made the assault upon the appellee, to find for the appellee, and, as appellant insists, wholly ignoring all right of self-defense.

The objection is not well taken. The instruction was intended only, and purports only, to advise the jury as to certain elements of damages which they might consider if they find for the plaintiff.

There seems no reason to believe that it might have been otherwise understood, even if standing alone; but when considered in connection with the other instructions it is manifest that it could not have been misapprehended.

The criticism upon the other instructions given for the appellee is technical, and does not touch the substantial correctness of the principles of law announced. It is not complained that the court refused or erroneously modified any instruction asked for by the appellant. Those given covered the whole range of the facts and every legal aspect of the case, and liberally recognized and declared the right of self-defense, not only as against real danger, but also as against only apparent or apprehended danger. The damages, though large, can not be deemed excessive, when the serious character of the injuries inflicted upon the appellee, the power of the jury to award exemplary damages, and the propriety of such an award under the proof, are all considered.

We find no substantial error upon points raised in the record, and can not say but that the judgment is right in every respect upon the merits. The judgment is affirmed.

Daniel Gregg v. John N. Wooliscroft & Co.

1. **TRADE AND COMMERCE—Trade Designations**—"Cool and Sweet Oats."—In the grain markets and among grain dealers the name of "cool and sweet oats" has been given to oats of another quality. "Cool and sweet oats" may be damp, unclean and light in weight, and even so defective and faulty that it will not fill the requirements of any trade. It is only required that the grain be sound, and that it arrive at its destination "cool and sweet."

2. **CONTRACT—Made by Postal Correspondence**.—Where an acceptance of a contract is to be made by mail, the proposer may withdraw his offer at any time before a letter is posted accepting it.

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3. AGENCY—*Who is a Special Agent.*—A special agent is one invested with limited specified powers which he is authorized to exercise only for a particular purpose. His power is measured by the express directions given by the principal.

4. AGENCY—*Who is a General Agent.*—A general agent is one who is empowered to act generally for the principal in some particular business, and to do all acts in connection with the particular business.

5. AGENCY—*Volume of Business Does Not Determine the Extent of the Agent's Authority.*—The volume of business transacted by an agent, does not determine the extent of his authority, for he may have acted only by express directions in each particular instance, and the volume of the business have been simply the result of the execution of numerous special orders from his principal.

6. AGENT—*Construction of Letter of Authority.*—Appellee wrote to a grain broker, "We want oats quite badly and can pay 25 cents for August, and 24 cents for September." Under the terms of the letter, it *was held*, that he had no power to make a contract for the sender of the letter to buy ten cars cool and sweet oats, for each August and September delivery.

Memorandum.—Assumpsit. Breach of contract of sale. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOK-WALTER, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

F. LINDLEY and G. W. SALMANS, attorneys for appellant.

CALHOUN, STEELY & JONES, and E. R. E. KIMBROUGH, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the appellee in the sum of \$700, as damages, occasioned by the refusal of the appellant to deliver ten car loads of cool and sweet oats in August, 1890, and the like quality of same character of oats in September of the same year, as appellee alleges appellant contracted to do.

The appellant, in 1890, was a grain dealer at Danville, Illinois. The appellee was at the same time engaged in the like trade at Cincinnati, Ohio, the firm consisting of one member only, John N. Wooliscroft. One D. R. Evans, in

June of the year named, was a grain broker in Danville, and in that capacity purchased grain for a number of customers, among them the appellee. As to the manner in which he conducted the brokerage business, Evans states that his customers would furnish him prices and he would go to parties, consummate the trades and would then name his principal to the seller. The appellee's right of recovery rests upon a contract which he alleges Evans made for him with the appellant, by which the appellant became bound to deliver to him, on board the cars at Danville, ten car loads of cool and sweet oats, during August, 1890, at twenty-five cents per bushel, and ten car loads of oats of same quality to be likewise delivered in the month of September, 1890, at twenty-four cents per bushel. The appellant denies that he entered into the alleged contract. The facts relating to this supposed contract as shown by the evidence, are about these: On the 24th day of June, 1890, Evans received a letter from the appellee, which, so far as it relates to the matter in hand, is as follows:

CINCINNATI, June 23, 1890.

D. R. Evans, Danville, Illinois.

DEAR SIR: * * * We want oats quite badly and can pay 25 cents for August and 24 cents for September. We look for a good demand for oats.

Yours truly,

J. N. WOOLISCROFT & Co.

This letter, it will be observed, does not mention or indicate the grade or quality of oats for which the prices named would be paid nor does it expressly direct Evans to buy for the writer. Both Evans and Wooliscroft agree that the relations between them arising from prior transactions were such that the letter was understood and intended as a direction to buy. It appears conclusively from the testimony that in the grain trade, propositions to sell, directions to buy, or contracts of purchase and sale of oats, where no grade or quality is specified, oats that will grade No. 2 is understood and implied. This is shown to be an unvarying rule among dealers in grain. To grade No. 2, oats must be

dry and reasonably clean, the grain sound and plump, in a degree that a measured bushel will reach the legal standard of weight.

In the grain markets and among grain dealers the name of "cool and sweet oats" has been given to oats of another quality; cool and sweet oats may be damp, unclean and light in weight, and even so defective and faulty that it will not fill the requirement of any grade. It is only required that the grain be sound and that it arrive at its destination "cool and sweet."

There is a material difference in the market value of "cool and sweet" and No. 2 oats, the latter being worth from two to five cents per bushel more than the former. Mr. Evans testifies concerning still another designation or trade name descriptive of other oats which he calls "mixed oats." No other witnesses testified concerning it, and he seems to have only an indistinct and vague idea about it.

He was not able to name its requisite qualities or tell how it might be distinguished from other grades; he said that "cool and sweet" might not be "mixed" oats, but that the distinction was very indefinite. He could give no further information upon the subject. We think the trade has not adopted the name of "mixed oats" as a trade designation, but so far as shown from the evidence in this case, oats of any grade or quality may be of mixed oats. Evans received appellee's letter on the 24th of June and called on the appellant on the same day. A conversation occurred between them which appellee relies upon to constitute the contract sued upon.

Evans' version of this conversation, given in his examination in chief as a witness for the appellee is, that he told Gregg he had received instructions from the appellee to pay twenty-five cents per bushel for mixed oats for August shipment and twenty-four cents per bushel for mixed oats for September shipment, and that Gregg refused to sell mixed oats but offered to sell ten cars of "cool and sweet" oats at the prices named for the respective months and that he, acting for the appellee, accepted the offer and closed the contract accordingly.

The appellant's version of this conversation is that Evans offered him the prices named for "No. 2," and that he declined to accept, but told Evans he would contract to sell ten cars of cool and sweet oats for each of the months at the respective prices named, and that Evans said he would submit the proposition to the appellee company and then went away.

On the same day Evans sent to the appellee the following telegram:

"Gregg accepts your offer 25 and 24—10 cars each mixed oats August and September shipment to arrive cool and sweet 110 per cents points.

D. R. EVANS."

It is further apparent from this dispatch that Evans was laboring under a confusion of ideas as to "cool and sweet" and mixed oats.

As the words "mixed oats" which he used in the telegram did not indicate any particular grade or quality of grain, we think grade "No. 2" was implied. True, the words cool and sweet are used, but were effectual only to indicate the condition of the oats at time of arrival and not as fixing the grade.

The appellee interpreted the message as we have and on the same day forwarded to the appellant this dispatch:

JUNE 24, 1890.

D. Gregg and Son, Danville, Illinois.

We bought from you this day 10,000 bushels, ten cars, August shipment, grade 2, mixed oats, price 25 cents; 10,000 bushels, ten cars, September shipment, grade 2, mixed oats, at 24 cents.

Yours truly,

Instructions later.

J. N. WOOLISCROFT & Co.

The appellant received this on the 25th of June, and on the same day notified Evans and the appellee that he had not offered to sell or sold No. 2 oats, and that he canceled his offer to sell cool and sweet oats. Evans in reply insisted that a contract had been closed for "cool and sweet oats," and that it must stand; that he would see that the appellee confirmed it as a purchase of cool and sweet oats.

The appellant refused, however, to make any new agreement, and asserted his right to "cancel all that had been done and announced that he withdrew his offer as to cool and sweet oats."

On the 26th of June the appellee wrote the appellant, that he had changed the entry of the contract for August and September oats to "cool and sweet" instead of "No. 2." The appellant refused to consider himself bound by what had occurred, so notified the appellee and Evans, and did not and would not deliver the grain.

The appellee instituted his action, and upon a hearing before a jury secured a verdict in his favor upon which judgment followed.

It is urged that it ought to be conceded that the jury accepted the version given by Evans of the conversation which it is claimed resulted in a contract. If that position be granted, still we are at a loss to know how it can be made to appear that the parties entered into a contract.

Evans' testimony is that the appellant offered to sell ten cars cool and sweet oats for each August and September delivery, and that he as agent for the appellee accepted the offer.

Was he authorized to make such a contract for the appellee?

We do not think the letter written him by the appellee gave him such authority. Interpreted as it must be as to the grade of oats to be bought by the usages, custom and rules of the branch of business in which all the parties were engaged, the letter only authorized him to buy No. 2 oats, and to that extent and effect only ~~did~~ it bind the appellee. It is apparent that the appellee so intended it to be understood, for in response to Evans' telegram to him that "Gregg accepts your offer," ten cars mixed oats "to arrive cool and sweet," he forwarded a dispatch to the appellant, saying: "We bought from you ten cars August shipment, grade 2, mixed oats * * * and ten cars September shipment, grade 2." The intention and understanding of the appellee further appears from his letter to appellant, written under date of

June 26, in response to appellant's notification that the offer of cool and sweet oats made to Evans was withdrawn, in which letter appellee says:

"We have changed the entry for the ten cars each August and September to cool and sweet oats instead of No. 2. We are short these oats and must have them even as cool and sweet oats. We will endeavor to put them upon other sales to interior points and get other oats grading No. 2, but as the case now stands we have to keep these twenty cars as per your understanding with Evans."

It is manifest from this extract from appellee's letter that the purpose and intent of the appellee when he indited the letter to Evans was to authorize Evans to buy No. 2 oats, but that as he at the time when writing to the appellant "was short of oats," he had concluded as the "case then stood" to take the oats though only "cool and sweet," and try to get elsewhere the No. 2 oats that he really authorized and expected Evans to buy. It seems perfectly clear that Evans was not authorized by the letter in question to buy "cool and sweet oats" for the appellee at the time he claims to have made the contract with the appellant upon which the suit is brought. His contract, if any he made on that occasion, so far as the latter was concerned did not bind the appellee. It is suggested that appellee ratified and confirmed the alleged contract. He did not do so by the letter of confirmation, for in it he expressly confirms a sale and purchase of No. 2 oats and the appellant had withdrawn his offer or canceled the sale before appellee took any further action whatever.

Before the appellee wrote the letter from which we last quoted he had received notice from Evans and also from the appellant that the appellant had revoked his offer and canceled any alleged sale. If the appellant offered to sell cool and sweet oats and Evans accepted the offer for the appellee the acceptance was unauthorized and not binding on the appellee until he adopted it, and in such case the appellant might lawfully withdraw the offer at any time before the appellee had accepted. When an acceptance is to be made

by mail the proposer may withdraw at any time before a letter is posted accepting it. 3 Amer. & Eng. Ency. 856.

But it is suggested that Evans, aside from any authority given by the letter, was a general agent for appellee, with full power and authority to buy oats of any grade for him, and that he made the alleged contract with the appellant by virtue of this general power, and thereto bound the appellee, his principal, and consequently the appellant became likewise bound.

The appellee testified that Evans was at the time his general agent and authorized to buy any kind or quality of oats for him without regard to the letter. Whether the agency was a general or special one was a question of law arising from the facts proven. In relation to the scope of his authority as agent, Evans testified, when on the stand in behalf of the appellee in rebuttal, that he did not make an offer to the appellant for No. 2 oats; that he had no authority to buy No. 2 oats; that his authority to buy was "right in that letter," and it was to buy "cool and sweet" oats. He stated also that his business was that of a grain broker, and the plan upon which he did business was that his customers would advise him as to grain they desired the price to be given, etc., and he would purchase according to such advices. He simply executed the orders of his customers as he received them.

A special agent is one invested with limited specified powers which he is authorized to exercise only for a particular purpose. Chitty on Contracts, 285; Story on Agency, Sec. 58.

Such was the extent of Evans' authority in the transaction in question, whether it arose from his general plan or system of conducting his business, or rested upon the letter written him by the appellant, upon which he insisted he acted, and from which he claimed to derive his power.

The power of a special agent is measured by the express directions given by the principal. 1 Parsons, Contract, 40.

A general agent is one who is empowered to act generally for the principal in some particular business, and to do all

acts in connection with the particular business. 1 Amer. & Eng. Ency. of Law, 348-9; Nat. Furnace Co. v. Keystone, 110 Ill. 427.

It seems perfectly clear that Evans had not power to deal for and bind the appellee as his general agent.

It is in proof that Evans bought many cars of oats and of other grain for the appellee. This is relied upon as establishing the claim that he was a general agent. It is not, however, shown that he made such purchases otherwise than in pursuance of special directions given him from time to time to do so, as was his general custom or system of transacting the business in which he was engaged.

The volume of business transacted by an agent does not determine the extent of his authority, for he may have acted only by express directions in each particular instance, and the volume of the business have been simply the result of the execution of numerous special orders from the principal.

Evans considered that his authority was to be found in the letter of the appellee. Nothing to the contrary seems to us to have been proven. As we construe the letter, in the light of the undisputed evidence, the authority given was to purchase No. 2 oats. Consequently he was unauthorized to buy cool and sweet oats, or to bind the appellee to a contract for that grade of oats. We think the minds of the parties did not meet upon the terms and conditions of a contract, and that neither became bound to the other.

Therefore the judgment appealed from can not be upheld, but must be and is reversed and the cause remanded.

Peoria, D. & E. Ry. Co. v. Emma Puckett, Administratrix.

1. JURORS—*Peremptory Challenge After Panel Accepted.*—A peremptory challenge should not be allowed after the jury has been accepted, without good cause shown.

2. EVIDENCE—*Habits of Injured Party.*—In an action to recover

P., D. & E. Ry. Co. v. Puckett.

damages for a death by negligent acts, evidence tending to show that the deceased was habitually careless and reckless in the performance of his duty, is competent.

8. INSTRUCTIONS—*Risks of the Employment.*—It is error to instruct the jury that an employe does not assume the risk of a cattle-guard or other danger, even though known to him, unless it has been properly constructed.

4. EMPLOYEES—*Duty to Choose the Less Dangerous of Different Ways.*—Where an employe has the power to adopt his own method of doing work, and he voluntarily selects of two ways the more dangerous, he does so at his peril, and can not recover for any injury resulting from such selection; as where a brakeman chose to disconnect cars while in motion when he could have done so while they were not.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Circuit Court of Coles County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

STATEMENT OF THE CASE.

The deceased was uncoupling a car about midnight, in the usual and customary manner for doing that work, and while doing it in the ordinary way, he slipped into a hole in the track and was killed.

There had been a cattle-guard there, but the fence had been removed, and there was nothing to warn him. The cattle-guard there had been abandoned, and the hole was not necessary for that purpose. The fence and cattle-guard had been moved back two hundred feet.

The hole was five feet long, and so deep that a man stepping into it would sink down to his pocket. It was useless and unnecessary as a culvert, as there was no ditch running into the same. After the death of the plaintiff's decedent, a box twelve inches square was put in and the hole filled up.

APPELLANT'S BRIEF, STEVENS & HORTON AND WILEY & NEAL, ATTORNEYS.

Plaintiff voluntarily uncoupled the cars while in motion, a negligent act sufficient to defeat a recovery. *Henderson v. Coons*, 31 Brad. 75; *O. & M. Ry. v. Bass*, 36 Brad. 126; *St. L. B. & I. Co. v. Burke*, 12 Brad. 369; *St. L. B. & I. Co. v. Brennan*, 20 Brad. 555; *Penn. Co. v. Hankey*, 93 Ill. 580.

The manner of performing the duty of uncoupling was under his control, and if he stepped upon the track and walked along between the cars while uncoupling them, he violated the rules of the company, and was guilty of negligence in so doing. *C. & A. v. Bragonier*, 119 Ill. 51; *L. S. & N. S. v. Roy*, 5 Brad. 82; *Lacroy v. N. Y. L. E. & W. (N. Y.)*, 30 N. E. 391; *Schaub v. H. & St. J. R. R. (Mo.)*, 16 S. W. 924; *E. T. V. & G. Ry. v. Smith (Tenn.)*, 14 S. W. 1077; *R. & D. R. Co. v. Risdon (Va.)*, 12 S. E. 787; *Gordy v. N. Y. P. & N. R. Co. (Md.)*, 23 At. 607; *Pryor v. L. & N. R. R. (Ala.)*, 8 So. 55; *Sedgwick v. I. C. R. R. (Ia.)*, 41 N. W. 35.

The cattle-guard was apparent to ordinary observation, and hence was among the dangers assumed by plaintiff. *Henderson v. Coons*, 31 Brad. 75; *St. L. & S. E. Ry. v. Britz*, 72 Ill. 256; *C., R. I. & P. v. Clark*, 108 Ill. 113; *C., R. I. & P. v. Clark*, 11 Brad. 104; *Simmons v. C. & T. R. R.*, 110 Ill. 340, 348; *C. & T. R. R. v. Simmons*, 11 Brad. 147; *McCormick Machine Co. v. Burandt*, 136 Ill. 170; *R. & D. R. Co. v. Risden (Va.)*, 12 S. E. 786; *Davidson v. So. Pac. Co.*, 44 Fed. 476; *Brooks v. North Pac.*, 47 Fed. 687.

CRAIG & CRAIG, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This case was here at a former term. (42 App. 642.) Its main features the case is substantially as it was then, and it is not necessary, therefore, to restate the facts or the respective theories of the parties. The judgment was for the plaintiff, and the record is again brought here by the appeal of the defendant. Various errors are assigned, and the arguments thereon are quite extended, but we shall notice only such points as seem to be most important.

1st. It is urged the court erred in permitting the plaintiff below to challenge peremptorily one of the jurors after the jury had been sworn, and after the opening statements had been made. No reason was given for such action.

As it appears from the record the court granted the leave

upon the mere request of the plaintiff and against the objection of the defendant. This was error. *Mayers v. Smith*, 25 Ill. App. 57; 121 Ill. 442.

A peremptory challenge should not be allowed after the jury has been accepted, without good cause shown.

To permit a party to take such a course would often result in giving him an undue advantage over his adversary, who may have accepted a panel of four because the challenged man was one of them. If one side may so challenge the other may, and thus one half of the jury might be discharged after the opening statements. Such a practice would be intolerable.

2d. It is argued that the court erred in refusing evidence offered by the defendant tending to show that the deceased was habitually careless and reckless in the performance of his duty as a brakeman.

It was a material question for the jury whether at the time he was injured, he exercised ordinary care. There was no direct proof on this point. Indeed, it is but a matter of inference how he received the injury. Under such circumstances, proof as to his habit as to carefulness was competent. *Gardner v. C., R. I. & P. Co.*, 17 Brad. 262; *A. A. P. & P. Co. v. Baier*, 20 App. 376; *McNulta v. Loughridge*, 32 App. 86; *C., R. I. & P. Co. v. Clark*, 108 Ill. 113.

It was error to refuse this evidence.

3d. The defendant asked for the following instruction without the words in brackets:

11. "You are further instructed that while it was the duty of defendant to provide a reasonably safe road-bed and structure, yet it was also Puckett's duty to be mindful of the known dangers of his work; and if you believe from the evidence that he knew the culvert or cattle-guard, in its then condition, was there, or by the exercise of ordinary observation might have known it (*and it had been properly constructed*) then he was bound to guard against it; and if, with such knowledge, he was injured in consequence of such culvert, the defendant can not be held liable in this case, and your verdict should be not guilty."

The court declined to give it as drawn but inserted the words in parenthesis and then gave it as so modified. The effect of this modification was to advise the jury that if they found the culvert or cattle-guard was not "properly constructed" then, though Puckett knew it was there, he was not bound to guard against it. This we think was error.

The question whether the cattle-guard was "properly constructed," so far as the evidence referred to it, mainly depended on whether it was necessarily or properly where it was. It was not so much a question of proper construction as of proper location. Perhaps it was not necessarily there. Perhaps it should or might as well have been further on.

But, be this as it may, if deceased knew it was there it must be presumed, in the absence of objection on his part, that he assumed the extra hazard arising therefrom. *Mo. Furnace Co. v. Abend*, 107 Ill. 44; *Wharton on Negligence*, Vol. 206; *Stafford v. C. B. & Q. R. R.*, 114 Ill. 244.

It is unnecessary to multiply authorities on this point.

The court stated in the fifth instruction for defendant the principle underlying this instruction as asked, and had it merely refused the instruction because the rule was already stated with sufficient clearness there would perhaps have been no ground for complaint, but by the modification the court in effect nullified the fifth instruction.

4. The court refused the eighth and ninth instructions asked by the defendant.

The eighth was as follows:

(8) "You are further instructed that if you believe from the evidence the deceased, Puckett, was employed by defendant company as railway brakeman upon a freight train, and that he, at the time of his injury and immediately prior thereto, had charge of the switching of the cars and the mode and manner in which they should be connected and disconnected, and that he could have chosen a safe way of disconnecting cars by doing so while they were stationary, but instead thereof he voluntarily chose to disconnect the cars while in motion, then if that was a dangerous method and so known to him, and he was injured in consequence

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thereof, there can be no recovery in this case, and your verdict should be not guilty."

The ninth was substantially the same.

We are clearly of opinion the principle stated in these instructions was correct and that it was applicable to the facts before the jury.

The point was sufficiently discussed in our former opinion and it is unnecessary to add anything to what was then said.

It was argued by counsel for appellee when the case was first here that appellant expected and required its employes to disconnect cars while in motion. We find nothing in the present record to sustain such position nor is it now so argued. For the errors indicated the judgment must be reversed and the cause remanded.

Ellen A. Smith v. John S. Curry.

1. *WILLS—Irreconcilable Clauses.*—Where two clauses of a will are diametrically opposed to each other, and are wholly irreconcilable, the latter must prevail; yet such latter clause, if such construction can be fairly given it, should be deemed to affirm, not to contradict, the earlier clause.

2. *WILLS—Clearly Expressed Intention.*—A clearly expressed intention in one portion of a will is not to be overcome by a doubtful construction of another portion.

3. *WILLS—Intention of Testator—Codicil.*—The intention clearly expressed ought to be carried into execution, unless the codicil unequivocally evinces that the mind of the testator underwent a change, so that he made other provisions for the disposition of his estate entirely inconsistent with and repugnant to his former intention.

4. *REMAINDER—The Term as Applied to Personal Property.*—The word remainder, as applied to real property, has a technical legal meaning, and while, strictly speaking, there can not be a remainder in personality, yet for the purpose of convenience of expression an interest in personality, to take effect after the determination of a prior life estate created by the same instrument, is frequently designated a remainder, and in construing a will the word may with propriety be given a technical legal meaning, or its meaning in popular and common use, as may seem to best accord with the intent of the testator, as gathered from the will as an entirety.

5. *WILLS—Construction of—Codicil.*—A testator by his will bequeathed unto J. C. \$1,000, to be paid out of his personal estate, and the remainder thereof to his wife for life. He afterward executed a codicil, in which, after the death of his wife, he bequeathed to L. C. "all my household and kitchen furniture of every kind whatsoever, all my live stock, and all the personal property on my farm, in my barn or out-buildings, and in addition to this, at the death of my said wife, the full sum of \$4,000 out of my personal estate not mentioned in this codicil," and to E. S. the remainder of his personal estate; it was held, that the legacy to J. C. was not revoked.

Memorandum.—Petition to construe a will. Appeal from the Circuit Court of Brown County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

STATEMENT OF THE CASE.

On the 3d day of March, 1881, William B. Turner, of Brown county, Illinois, executed the following will:

Whereas, I, William B. Turner, of the town of Lee, county of Brown, State of Illinois, being of sound mind and memory, do make, publish and declare this my last will and testament, hereby revoking and annulling all former wills by me made.

First: It is my will and desire that all my just debts and funeral expenses be fully paid, and a suitable tombstone of the value of not less than seventy-five dollars be erected over my grave.

Second: I give and bequeath unto my brother-in-law, John S. Curry, and his heirs, forever, one thousand dollars in good and lawful money, to be paid out of my personal estate, and the residue and remainder of my personal estate of every kind and condition, I give and bequeath to my beloved wife, Sarah Turner, during the term of her natural life.

Third: I give, devise and bequeath unto my beloved wife, Sarah Turner, during the term of her natural life, with all the rents, issues and profits arising therefrom, all the real estate of which I may die seized, described as follows, to-wit (here the real estate is described). She to keep said premises in good state of repair.

Fourth: At the termination of my said beloved wife's

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estate I give, devise and bequeath unto my nephews, Charles Turner, William Turner, Samuel H. Wallace, Francis L. Wallace, Robert L. Banton and James Banton, all of the residue and remainder of my personal estate undisposed of by my said wife, to be divided equally between them, and all of the real estate of which I may die seized, and as above described. And it is my desire that upon the termination of the life estate of my wife, that my executor sell and dispose of all the unexpended personal estate above bequeathed, and all my real estate above described, on such terms and at such time and place as my executor may deem best, and divide the proceeds arising therefrom equally between my six nephews above mentioned, and I hereby vest in my executor full power and authority to dispose of my real estate, in fee simple, in as full and large manner in every respect as I could do myself if living, upon the termination of the life estate of my wife.

And lastly, I do make and appoint my friend Charles Moffet executor of this last will and testament.

Dated this 23d day of March, 1881.

WILLIAM B. TURNER. [SEAL.]

And on the 16th day of May, 1887, he executed the following codicil:

CODICIL.

I, William B. Turner, make this codicil to my will and testament which was dated the 23d of March, A. D. 1881.

First. After the death of my beloved wife, I give, devise and bequeath unto Lillie Crawford, who has long been a faithful and affectionate servant of myself and wife, all my household and kitchen furniture, of every kind whatsoever, all my live stock and all the personal property on my farm, in my barn or out-buildings, and in addition to this, at the death of my said wife, the full sum of four thousand dollars out of my personal estate, not mentioned in this codicil.

I give and bequeath unto my niece, Ellen A. Smith, the remainder of my personal estate. May 16th, 1887.

WILLIAM B. TURNER. [SEAL.]

After the death of the testator, which occurred on the

11th day of April, 1891, the will, including the codicil, was duly proven and admitted to probate.

Sarah, the widow of the testator, died on the 3d day of July, 1892.

On the 4th of November, 1892, John Curry filed in the County Court of Brown County a petition asking that the executor pay to him the legacy of \$1,000, mentioned in the second clause of the will.

This petition was antagonized by Ellen A. Smith, the legatee named in the last clause of the codicil, her claim being that the codicil made full disposition of all the testator's personal property and operated to revoke the provisions of the will under which Curry claimed as legatee. The County Court entertained the view that such was the proper construction of the will and denied the prayer of the petition of Curry, who appealed to the Circuit Court. The Circuit Court, upon appeal, ruled that the legacy to Curry was not revoked by the will and directed the executors to pay the legacy to Curry.

From this judgment of the Circuit Court Ellen A. Smith appeals to this court.

APPELLANT'S BRIEF, J. F. CARROTT, ATTORNEY.

In construing wills the intention of testator must govern when ascertained, and this intention must be sought for in the language of the will itself, without the aid of extraneous evidence. *Blanchard v. Maynard*, 103 Ill. 60; *Taubenham v. Dunz*, 125 Ill. 524.

Extrinsic evidence is admissible to show the circumstances under which the will was made, the state and condition of the property, the family and the like, in order to enable the court to arrive at the intention of the testator. *Kaufman v. Breckinridge*, 117 Ill. 305.

The codicil to this will makes a different and full disposition of all of the testator's personal property, and to that extent it revokes the will. *In re Fisher*, 4 Wis. 254.

Where a clause in the original will and one in the codicil thereto are entirely inconsistent, and both can not be executed, the latter clause must prevail. 1 *Jarm. on Wills*

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(Amer. Notes by Randolph & Talcott), 339; Beardsley v. Selectmen of Bridgeport, 53 Conn. 490; Hunt's Estate, 133 Pa. St. 260; Newcomb v. Webster et al., 113 N. Y. 191.

It was evidently the intention of the testator, as gathered from the two instruments and from all the circumstances, to revoke the will and make an entirely new disposition of his personal property by the codicil. In re Fithian, 44 Hun 457, 181.

APPELLEE'S BRIEF, W. L. VANDEVENTER AND O'HARA,
SCOFIELD & HARTZELL, ATTORNEYS.

1. A codicil is a supplement to a will by which the will is either enlarged or restricted. It may add to, or subtract from, alter, explain, confirm, re-execute, revive or republish any will with which it may be incorporated. There may be many codicils, but there can be but one will. 1 Jarm. on Wills, 5th ed. 27; 4 Kent's Com. 623; Williams on Exrs., 8; Shep. Touch. 399.

2. The codicil and original will must be regarded and construed together as one single instrument, and nothing is to be rejected except in case of absolute necessity. Nagley v. Gard, 20 Ohio, 310; 1 Redf. Wills, p. 288, Sec. 4 (2d Ed.); Schouler on Wills, Secs. 468-487; Sturgis v. Work, 22 N. E. Rep. 997; Hervey v. Chouteau, 14 Mo. 587; Beall v. Cunningham, 3 B. Monroe, 390; Brimmer v. Sohler, 1 Cush. 118; City of Peoria v. Darst, 101 Ill. 609; Jenks v. Jackson, 127 Ill. 341; Stinson v. Vroman, 99 N. Y. 74; Wickman v. Samson, 5 Hare, 91; Hitchcock v. Hitchcock, 35 Pa. St. 393; Sherer v. Bishop, 4 Bro. C. C. 55; Day v. Croft, 4 Beav. 561.

3. The attention of the testator, if not inconsistent with the rules of law, must govern, and this intention is to be ascertained from the whole will and all its parts taken together. Every clause and provision, if possible, should have effect given to it according to the intention of the maker. Hamlin v. U. S. Express Co., 107 Ill. 448 and cases there cited; Bland v. Bland et al., 103 Ill. 11; Rountree v. Talbot, 89 Ill. 249; 1 Redf. Wills, 334; Dickson v. Dickson, 138 Ill. 541, and cases cited; Schouler on Wills, §§ 8-468-487-478; Jenks et al. v. Jackson, 127 Ill. 341; Taubenhan v. Dunz, 125 Ill.

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524; *Wills et al. v. Watson et al.* 4 *Scam.* 64; *Schäfer v. Schaefer*, 141 Ill. 237, No. 3 Ad. sheets.

4. A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any portion of the same instrument; and the intent as gathered from the whole will overrides all those technical rules which relate to the construction of words. *Covenhoven v. Schuler*, 2 *Paige* 122; *Homer v. Shelton*, 2 *Met.* 202; *Schouler on Wills*, § 209, 437; *Jenks v. Jackson*, 127 Ill. 341; 1 *Redf. on Wills*, p. 253, pl. 13, 2d Ed., *ib.* p. 420. See cases cited at paragraph 2, *supra*.

5. A will is never to be disturbed by a codicil further than is absolutely necessary to give it effect. *Schouler on Wills*, § 437; *Sturges v. Work* (Ind.), 22 *N. E. Rep.* 997; *Brant v. Wilson*, 8 *Cow.* 56; *Bruce v. Bissell* (Ind.), 22 *N. E. Rep.* 4; *Bailey v. Sanger*, 9 *N. E. Rep.* 108 *Ind.* 264; *Conover v. Hoffman*, 1 *Bosw.* 214.

6. Where the later paper is styled a codicil, it implies an intent to amend but not to repeal. *Schouler on Wills*, § 409; *Re Howard*, *L. R.* 1 *P. & D.* 636.

7. When the terms of the will are clear and unequivocal to give an interest or estate, the words of a codicil must manifest an intent equally clear, unequivocal and decisive, to revoke it. It is not sufficient to merely raise a doubt as to the revocation, but the language of the codicil must be clearly and irresistibly irreconcilable with the original will. *Collins v. Collins*, 40 *Ohio St.* 353; *Bailey v. Sanger*, 108 *Ind.* 264; *S. C.*, 9 *N. E. Rep.* 159; *Thornville v. Hall*, 2 *Clark & F.* 22; *Hockstelder v. Hockstelder*, 108 *Ind.* 506; *S. C.*, 9 *N. E. Rep.* 467; *Goudie v. Johnson*, 109 *Ind.* 427; *Hearle v. Hicks*, 8 *Bing.* 475; *Quincy v. Rogers*, 9 *Cush.* 291; *Freeman v. Coit*, 96 *N. Y.* 63; *Roseboom v. Roseboom*, 81 *N. Y.* 356; 1 *Redf. on Wills* (2d Ed.), p. 356 pl. 23; *City of Peoria v. Darst*, 101 *Ill.* 609.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

We can not assent to the view pressed upon us by counsel for the appellant, that the clauses of the will and of the cod-

icil are in respect of the rights of these parties so irreconcilable and repugnant that both can not stand. "Such a result should never be declared unless, after the application of all rules of construction, it is found that the difficulty is unsolved and the repugnancy invincible." *Dickenson v. Dickenson*, 138 Ill. 541. The rejection of one clause of a will to uphold another is declared in *Jenks v. Jackson*, 125 Ill. 341, to be "a desperate remedy, to be resorted to only in case of necessity." And in the same case it is said: "While where two clauses are diametrically opposed to each other and are wholly irreconcilable, the latter must prevail, * * * yet such later clause, if such construction can be fairly given it, should be deemed to affirm, not to contradict the earlier clause." It is also a familiar rule that a clearly expressed intention, in one portion of a will, is not to be overcome by a doubtful construction of another portion of a will. *Schouler on Wills*, Sec. 203-457; *Covenhoven v. Schuler*, 2 Paige, 122. The intent of the testator in the case at bar to bequeath \$1,000 of his personal estate to the appellee is not only clearly and unequivocally expressed in the second clause of what may, for convenience' sake, be called the original will, but the inference that the testator desired to give such legacy a priority and preference over all other gifts and bequests inevitably arises from the words used in and the context of said second clause. The bequest, the second clause directs, shall be paid to the appellee in good and lawful money, out of the personal estate, as the first disbursement after the payment of debts, etc., and after such payment the residue and remainder of the estate is bequeathed to the wife, Sarah, during her natural life. In the testator's mind this legacy had preference over the provision made for the wife, for whom it is manifest that he entertained full husbandly affection. Aside from bequeathing this legacy to Curry, he invests his wife with full ownership and control of the remainder of his estate of every nature and kind during her life.

The desire and intention to give the legacy to the appellee so clearly expressed ought to be carried into execution un-

less the codicil unequivocally evinces that the mind of the testator has undergone a change and that he made other provisions for the disposition of his estate, entirely inconsistent with and repugnant to his former intention. We do not think there is any necessity for resorting to the "desperate remedy" of rejecting the clause giving the legacy to the appellee. The conflict between the provisions of the codicil and of the will are, we think, apparent only and arise out of a doubtful and strained construction of the terms of the codicil.

The second clause of the original will, as it is called, bequeaths \$1,000 out of the personalty to the appellee and the remainder to Sarah, the wife, for life. The third clause devises the real estate to Sarah for life. The fourth clause deals with the property which may, at the death of the wife, remain undisposed of by her, and directs that it be sold and the proceeds divided equally between six nephews of the testator whose names are given.

The codicil in its first clause affects and purports to affect only property given the wife for life by the original will and by her undisposed of during her lifetime, and in its second clause deals with a remainder of the personal estate of the deceased. The word "remainder," as applied to real property, has a technical legal meaning, and while, strictly speaking, there can not be a remainder in personalty, yet for the purpose of convenience of expression an interest in personalty to take effect after the determination of a prior life estate created by the same instrument is frequently designated a remainder, and in construing a will the word may, with propriety, be given a technical legal meaning, or its meaning in popular and common use, as may seem to best accord with the intent of the testator as gathered from the will as an entirety.

We think this word "remainder" was used by the testator in its popular sense, and was intended to designate such of his property as should remain after a portion of it had been applied to other purposes according to the direction of the will; a balance remaining after a portion had been other-

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wise appropriated. The will first directs payments of the debts and funeral expenses of the testator and the cost of a tombstone. A balance or remainder of the personal estate would remain after such expenditures, but no one would contend that it was this balance or remainder that the testator intended to give the appellant, for that would leave the wife and Lillie Crawford as well as the appellee, wholly unprovided for. The desire of the husband to provide liberally for the wife is so manifest and natural, and the special provisions for Lillie Crawford so clear, as to render a conclusion that he intended to exclude them in favor of this appellant preposterous and absurd. After providing for the payment of his debts, funeral expenses and cost of a tombstone the testator bequeaths the legacy to the appellee and directs that the same be paid in good and lawful money out of his estate, and thus a second remainder or balance is created. This balance or remainder is, however, given to the wife; and when the whole will is considered together, it would be in unjustifiable defiance of the unmistakable intention of the testator to hold that he intended by the clause in the codicil in question to exclude the wife and vest the balance of his property after the payment of the legacy to Curry in the appellee. He had no such thought. He intended that his wife should have for life all his personalty after his debts, funeral expenses and the legacy to Curry had been paid. At the death of his wife the balance or remainder of the property not used by her was to be disposed of. This is the remainder the codicil refers to and makes disposition of, and it was intended by the codicil to change and affect only the fourth clause of the original will. This construction seems to us the only reasonable one. It harmonizes all apparent inconsistencies and carries into execution the manifest wish of the maker.

If the testator designed the use of the word remainder in its technical sense the construction we have given the will would be as well sustained as if the popular meaning of the word be adopted.

In such sense the word remainder would apply only to an

interest in personalty remaining at the expiration of a prior life estate created by the will. The only such life interest is that of the wife, and it included only such of testator's personalty as should remain after the payment of the legacy to Curry. The remainder could not include more. In any view that may be taken the judgment of the court was right and must be and is affirmed.

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Eugene T. Miller et al. v. The People of the State of Illinois, on the Relation of Joseph Simons.

1. **PRODUCTION OF BOOKS OF ACCOUNT—***Power of the County Court.*—Under Sec. 128, Ch. 3, R. S., providing that "the books of accounts of any deceased person shall be subject to the inspection of all persons interested therein," the County Court is vested with general jurisdiction in the settlement of estates, and may make all orders regarding the production of such books as may be necessary to the protection of claimants and others having pecuniary interests involved.

2. **COUNTY COURTS—***Inherent Powers.*—Independent of Sec. 81, Ch. 3, R. S., the County Court has the inherent power, necessary to the due exercise of its general authority, to compel the production of the books of account of the deceased in the hearing of claims against the estate.

3. **ADMINISTRATION OF ESTATES—***Sale of Books of an Estate.*—Appellant filed two claims against an estate for salary and profits alleged to be due him on account of his connection with the business of the deceased. Upon a showing that the books of accounts of the deceased were of importance in reference to these claims, he procured a citation upon the executors and their attorney to produce them. The defense to the citation was that one of the executors, having occasion to use the books in preserving the evidence by bill of exceptions in order to prosecute an appeal from the decision of the Circuit Court in the matter of his claims against the estate, had incorporated them in a bill of exceptions, and to enable him to do so without interference a bill of sale of said books had been made to the attorney by the executors for the sum of \$5. *It was held* that the sale of the books was without authority of law and without permission of the court and was void.

Memorandum.—Administration of estates. Order on executors to produce books. Appeal from the Circuit Court of Hancock County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

Miller v. The People.

APPELLANT'S BRIEF, GEORGE W. FOGG AND O'HARA & SCOTFIELD, ATTORNEYS.

The enactment of the 81st section of chapter 3, of Ill. R. S., touching the discovery of assets of deceased persons, did not thereby provide a new and summary method for the trial, without the intervention of a jury, of controverted and contested questions concerning title or ownership of chattel property, notes, bonds or books, or books of account, even though one of the contestants should be an executor, or the defendant deduce title through a decedent or through his legal representative. Vols. 1 and 3, Starr & Curtis' Statutes, Ch. 3, Sec. 81, and cases there cited; *Townsend v. Radcliffe*, 44 Ill. 448; *Wade v. Prichard*, 69 Ill. 280; *Minzer v. Berington*, 42 Ohio 327-8; *Evans v. Evans*, 79 Mo. 53; *Hood v. Dych*, 47 Mo. 215; *Reidey v. Newell*, 37 Mo. 126-8; *Howell v. Fry*, 19 Ohio, 556; *Powers v. Blakey's Admr.*, 16 Mo. 437; 71 Cal. 272, 269; *People v. Abbott*, 105 Ill. 588. This statute is cumulative, and action will lie under it only when detinue, trover or replevin would lie, and then only against persons that might properly be made defendants in those actions. *Williams v. Conley*, 20 Ill. 645; *Wade v. Pickerell*, 69 Ill. 280.

A bill in equity is the only mode of procedure to hear and determine questions of fraud or fraudulent acts in an executor or trustee. Under the course of procedure in that court, the issues can be fairly presented and tried, and restitution or other proper remedy directed, according to the usual course of practice in such courts. *Guphil v. Isbell*, 19 Am. Dec. 675; *Parsons v. Geer*, 12 Fed. Rep. 607; 20 *Blatchford*, 535; *Smith v. Lucher*, 6 Cowan, 686; *Bispham on Eq.* 300, 1 note and cases cited; *Howell v. Moore*, 127 Ill. 67; 128 Ill. 307; 119 Ill. 93; 123 Ill. 260; 101 Ill. 190; 9 Cowan, 325; 7 Cowan, 306; 5 Md. 219; 43 Ind. 150; 28 Ohio State, 231.

Suit to set aside an executor's sale, on the ground of fraud or collusion, in violation of his trust and the rights of distributees and others, can be maintained by creditors, legatees, heirs, and other distributees, in a court of equity only. *Worthy v. Johnson*, 52 Am. Dec. 400; *Swink v. Snodgrass*,

Ibid. 193; Ringold v. Ringold, 18 Am. Dec. 250; Zimmerman v. Kinkle, 108 N. Y. 282, and cases cited; Colt v. Lannier et al., 9 Cowan, 319; Morton v. Paulding, 10 Paige, 40; Bigelow on Fraud, 473.

Courts of equity exercise a general jurisdiction in cases of fraudulent sale, and, on proper bill of complaint, may set aside the sale and order the surrender of sale bills, and a return of the thing sold. Story's Equity, Sec. 184; Bigelow on Fraud, 321; Petrie v. Clark, 11 Serg. & Rawle, 377; Southerland v. Barths, 7 John. Ch. 17.

APPELLEE'S BRIEF, SPRIGG, ANDERSON & VANDEVENTER,
ATTORNEYS.

Under Sec. 81, Ch. 3, R. S., all personal property, books, etc., belonging to an estate, can be recovered from a wrongful holder, whether he got them before or after the death of the decedent. Steinmann v. Steinmann, 105 Ill. 348; Blair v. Sinnott, 134 Ill. 78.

And if one of several executors is guilty of misconduct the court will interfere if necessary and compel him to place notes, bonds and securities in his possession in other custody. Wood v. Brown, 34 N. Y. 337.

The books of account of any deceased person shall be subject to the inspection of all persons interested. R. S., Ch. 3, Sec. 128. And this has been the law of the State of Illinois since 1845.

The books of account attempted to be sold, of no money value and necessary for protection of the estate and required by the statute to be subject to the inspection of all persons interested, are not salable assets. Eyre v. Higbee, 35 Barb. 502; 1 Story Eq. Jur. 613, Sec. 531 (6th Ed.); 2 Woerner Am. L. Adm., Sec. 305, note 2; Wood v. Brown, 34 N. Y. 337; 2 Bl. Com. 510.

The County Court has ample power to order the books restored without the delay and expense of a suit in chancery or an action on the official bond of the executor. Mathews v. Hoff, 113 Ill. p. 90; Farewell v. Crandall, 120 Ill. 70; Seavey v. Seavey, 30 Ill. App. 626.

Miller v. The People.

Even if the books could in any event be considered assets of a salable character by the executor, the sale under the circumstances shown was void. The purchaser knew it was an attempt, and made with design to apply the same to the use of the executor, Eugene T. Miller. *Murray McConnell v. William Hodson et al.*, 2 Gil. 640; *Makepeace v. Moore*, 5 Gil. 474; *Colt v. Lasnier*, 9 Cow. (N. Y.) 320.

The alleged sale was also void for want of an order of the County Court authorizing it. R. S., Ch. 3, Sec. 91; *Wyatt's Admr. v. Rambo*, 29 Ala. 510; *Wyatt's Admr. v. Rambo*, 68 Am. Dec. 89.

The attempt of the two executors to sell these books of account—a thing without precedent—that fact alone is a strong presumption that it can not be done at all. *Russell v. Men of Devon*, 2 T. R. (D. & E.) 312; *Eyre v. Higbee*, 35 Barb. 502.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The arguments of counsel in this case have taken a wide range, and though many questions are raised and discussed with vigor and ability, we think the only points necessary to be considered may be briefly stated and disposed of. Pursuant to the will of George A. Miller, deceased, his widow was appointed executrix, and the appellants, Eugene T. and Alexander T., sons of the deceased, and appellee, Joseph Simons, a son-in-law, were appointed executors. They qualified and proceeded to adjust the estate, which is still in course of administration. Appellant Eugene T. Miller filed two claims against the estate for large amounts for salary and profits alleged to be due him on account of his connection with the business of the deceased. The litigation upon these claims has not yet terminated. The books of account of the deceased are of importance in reference to these claims as well as to various other matters arising in the settlement and division of the estate. The appellants, who are the said Eugene T. and Alexander T. Miller, and George W. Fogg, their attorney, were cited to produce these books to the end that they might be delivered to such person or custody as

the court should direct. The answer disclosed as a defense that said Eugene T. Miller, having occasion to use the books in preserving the evidence by bill of exceptions, in order to prosecute an appeal from the decision of the Circuit Court in the matter of his said claims against the estate, had incorporated said books in said bill of exceptions, and to enable him to do so without the interference of the appellee, a bill of sale of said books had been made to said Fogg by the said Eugene T. Miller, Alexander T. Miller and Anna P. Miller, for the sum of \$5. This answer was in substance a restatement more in detail of the facts alleged in the petition, and thus the question is whether the order appealed from, that the books should be returned to the clerk of the County Court, subject to the direction and order of said court, was a proper one.

We are entirely satisfied with that order and have no doubt of its propriety.

By Sec. 128, Ch. 3, R. S., it is provided that "the books of accounts of any deceased person shall be subject to the inspection of all persons interested therein." The County Court is vested with general jurisdiction in the settlements of estates, and may make all orders necessary to the protection of claimants and others having pecuniary interests involved. In this instance one of the executors has presented a claim in his own favor in regard to matters of which these books were the chief records, and by the arrangement stated, he has undertaken to exercise exclusive control of the books under the alleged ownership of his attorney, by virtue of an alleged sale.

If he can do this, the statutory provisions above quoted may be nullified.

The sale of the books was without authority of law and without permission of the court and was void. The appellants had no right to the sole custody of the books, and when they asserted such power, there was presented a situation which made it proper and necessary that the books should be placed under the immediate control of the court for the benefit of all persons having a right to inspect the same.

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It is not necessary to determine whether the power to make such order is given by Sec. 81 of the Administration Act. If it is not, the court would have the inherent power as necessary to the due exercise of its general authority in the premises.

The judgment of the Circuit Court will be affirmed.

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**Norman H. Camp, and Curtis H. Camp, Impleaded
with William M. Camp, Executor, et al., v.
Catherine Shaw, William Swaney et al.**

1. *WILLS—Contesting Under the Statute.*—A proceeding under Sec. 7, Ch. 148, entitled "Wills," providing that "any person interested may, within three years after the probate of any will, appear, and by his or her bill in chancery contest its validity, and an issue at law shall be made whether the writing alleged to be the will of the deceased is his will, and that such issue shall be tried by a jury according to the practice in courts of chancery," is a chancery proceeding and governed by the rules of chancery practice and procedure, except that the verdict of the jury is not merely advisory to the court as upon a feigned issue in other purely chancery actions.

2. *WILLS—Practice in Statutory Contests.*—The verdict of the jury in cases under section 7 of chapter 148, entitled "Wills," is obligatory upon the court to the same extent as a verdict at law, but according to the chancery rule the entire proceedings are matters of record and subject to review in the Appellate Court without the taking and noting of technical exceptions to the rulings of the court.

3. *CHANCERY PRACTICE—Exceptions, etc.*—The rules of chancery practice do not require that exceptions be taken and noted to the various holdings of the court during the progress of a trial.

4. *VERDICTS—When to be Set Aside.*—A verdict manifestly against a clear preponderance of the evidence will be set aside.

5. *WILLS—Alterations, When Spoliations.*—Alterations in a will or other instrument, if made by a stranger to it, are but spoliations and do not operate to avoid the will or instrument thus mutilated or defaced. If the will of a deceased person is altered without fraudulent intent or by one not interested in its provisions, equity will enforce it as originally written, if its original condition can be ascertained.

6. *WILLS—Presumptions as to Interlineations.*—The presumption as to interlineations or erasures in a will is that they were made after the execution of the will. If made by the testator and not re-attested, inter-

lineations or erasures have no legal effect, but it being presumed that the erasure was intended to be dependent upon the alterations going into effect as a substitute and the attempted alteration having failed for want of legal authentication, the will, if its original reading can be made out, will stand as first written, and if its original wording can not be determined it will be enforced in all other parts, the illegal portions treated as blanks.

7. *WITNESS—Parties—The Rule of Common Law in Chancery Proceedings Not Changed.*—At the common law it was competent for the defendant in a chancery proceeding to testify in behalf of a co-defendant, provided the witness was disinterested in the matter about which he was called to testify. Our statute makes no change in this common law rule.

8. *WILLS—Additions Not Attested as Affected by the Execution of Codicils.*—A person having executed his will, afterward wrote an addition to it, marked it sheet B, and attached it to the will, intending it to operate as a codicil, but did not acknowledge it or cause it to be attested, and afterward executed and acknowledged a codicil and fastened it, "sheet B," and the will, together. *It was held* that the codicil operated as a publication and due execution of the sheet B and the will all speaking from the date of the codicil.

9. *CONTESTING WILLS—Practice—Collateral Issues—Cross-bills.*—When a contestant admits the execution of the original will and codicil but denies that certain instruments attached to the will are parts of it, and makes persons interested in such instrument parties, a cross-bill is not necessary pleading to raise the question as to whether the "certain instruments" were a portion of the will.

Memorandum.—Proceeding to contest a will. Error to the Circuit Court of Piatt County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

BRIEF FOR PLAINTIFFS 'IN ERROR, HENRY G. MILLER AND
NORMAN H. CAMP, ATTORNEYS.

If "sheet B" was not a part of the will at the time it was originally executed and attested, but was afterward, and before making the codicil, inserted in the will by the testator, with the intention of thereby making it a part of his will, then the legal execution of the codicil to the will, as thus amended and altered, rendered the whole will including "sheet B" good and valid as a will. *Burge v. Hamilton*, 72 Ga. 568; *In re Goods of Sykes*, L. R., 3 P. & D. 26.

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A codicil is now commonly understood to be an addition to or alteration of, the last will and testament. 1 Redfield on Wills (3d Ed.) 6.

It has often been held that a codicil may operate as a republication of a former will. The effect of a codicil ratifying, confirming and republishing a will is to give the same force to the will as if it had been written, executed and published at the date of the codicil. 1 Redfield on Wills, 288.

A codicil need not be actually annexed to the will in order to have it operate as a republication of the will. When a codicil is so executed as to be a republication of the will, both should be read and can stand together as one entire instrument, and the will speaks from the date of the codicil. Van Cortland v. Kip, 1 Hill 590, 7 Hill 346.

Declarations of the testator made both before and after the execution of his will or codicil are relevant to show what papers constituted his will. Sugden v. St. Leonards, L. R., 1 P. D. 152; Gould v. Lakes, L. R., 6 P. D. 1; Burge v. Hamilton, 72 Ga. 568; Stephens' Digest of Evidence, Art. 29.

**BRIEF OF DEFENDANTS IN ERROR, BUCKINGHAM & SCHROLL
AND S. R. REED, ATTORNEYS.**

In contested will cases arising under our statute, the verdict of the jury is to have the same force and effect as is given to a verdict in a case at law under a like state of facts. Calvert v. Carpenter, 96 Ill. 63; Shevalier v. Seager, 121 Ill. 564; Long v. Long, 107 Ill. 210; Brownfield v. Brownfield, 43 Ill. 147; Meeker v. Meeker, 75 Ill. 260; American Bible Society v. Price, 115 Ill. 635.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery, filed by the defendants in error, to contest the will of Dr. Edward Swaney, who died in Bement, Piatt county, Illinois, on the 28th day of January, 1891. The issues formed under the pleadings in the cause were submitted to a jury, as required by Sec. 7 of Chap. 148, R. S., entitled "Wills." The record presented

to this court was prepared in compliance with the rules of chancery practice. It is urged that the rulings of the court on evidence, motions and instructions can not be reviewed in this court unless exception thereto was taken at the time, and such exception preserved in a bill of exceptions, as in cases upon the common law side of the court.

The proceeding was instituted in virtue of authority given by Sec. 7 of Chap. 148, entitled "Wills," the provisions of which are that "any person interested may, within three years after the probate of any will, appear, and by his or her bill in chancery contest its validity, and an issue at law shall be made whether the writing alleged to be the will of the deceased is his will, and that such issue shall be tried by a jury, according to the practice in courts of chancery."

The proceeding therefore, is, we think, in chancery, and governed by the rules of chancery practice and procedure, except that the verdict of the jury is not merely advisory to the court, as if upon a feigned issue in other purely chancery actions. The verdict of the jury in this and like cases under the 7th section of the chapter on wills, is obligatory upon the court to the same extent as a verdict at law, but according to the chancery rule the entire proceedings are matter of record and subject to review in this court without the taking and noting of technical exception to the rulings of the court. The rules of chancery practice do not require that exceptions be taken and noted to the various holdings of the court during the progress of a cause. *Smith v. Newland*, 40 Ill. 100.

The instruments purporting to constitute the will of the deceased consisted of a paper writing denominated by the parties hereto, the "original will," which bore date July 23, 1888, was duly signed, and acknowledged and witnessed as the will of the deceased, and another paper executed afterward by the deceased, but not dated or witnessed, called by the parties "sheet B," and yet another paper executed after sheet B, purporting to be a codicil to the will, dated January 9, 1891, and duly attested by witnesses. The jury found by their verdict that the writing of the

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date of July 23, 1888, called by the parties the original will, was the last will and testament of the deceased, and that sheet "B" and the codicil were not parts of the will. The ground of attack upon the codicil was that the testator was, at the date of its execution, of unsound mind, and mentally incapable of making a valid will or of "requesting witnesses to attest a paper as a will." The codicil bears date January 9, 1891, but it is contended by the defendants in error and conceded, that it was not attested by witnesses until in the evening, after nightfall, of the 10th day of that month. The only evidence we have been referred to or have been able to find upon a careful examination of the record, tending in any degree to establish the alleged mental incapacity of the testator at that or any other time, is the testimony of Dr. Vance. It is to the effect that the witness was called in his professional capacity to see the testator, and saw him on the 10th of January, the day of the execution of the codicil. He would not say positively whether he visited the deceased before or after noon of that day, but as he could best recollect it was in the afternoon. He stated that he found his patient, who was also a physician, and had been taking morphine under his own prescription, in a semi-comatose condition from the effect of that drug which he had taken in such quantity as to render him so stupid and unconscious that he was unable to intelligently comprehend or transact ordinary business, a mental condition which the witness thought would continue until the effect of the opiate had passed away, which might occur in five or six hours, possibly longer. When directly asked, the witness said he could not say that the effects of the morphine had not passed away at the time it is alleged the codicil was attested.

Dr. Vance continued the use of morphine but in smaller doses. He next saw the deceased on the 12th of January, and then found him much improved in mind; in a normal condition mentally, and able to enter into and hold rational and intelligent conversation.

After that the patient was, in the opinion of Dr. Vance, at times in possession of his mental powers and at other

times his mind would seem to wander and be beyond control.

Dr. D. D. Kemmel and Ada C. Kemmel, his wife, both of whom were friends of many years standing of the testator and who were selected by him as witnesses to his "original" will, testified that they visited him after supper and "after dark" on the 10th day of January. That he was entirely rational and sound in mind and fully comprehended what he was about to do. He made a statement to them about a codicil he desired to add to the will they had previously signed and then produced the papers presented to the jury as the codicil and said to Dr. Kemmel, "Here is a codicil to my will; I wish you and your wife to sign it. I acknowledge this as my signature to the codicil." That they signed their names as requested, after which he took the paper and seemed to be reading or looking it over as he folded it. Unless these witnesses were deemed unworthy of credit, it would seem undeniable that the deceased was free from the influence of morphine and capable of intelligent and rational action when, at his request, they, as witnesses, signed the codicil. No reason appears for discrediting them. They evidently enjoyed and had for many years possessed the confidence and esteem of the testator. Their statements were not, it seems to us, irreconcilable with the testimony of Dr. Vance, but could readily be harmonized with it; nor were they contradicted, or in any way discredited, or the value of their testimony impaired by anything otherwise appearing in the record. Upon the contrary, the testimony of all other witnesses who spoke of the mental capacity of the deceased, is that he was of sound mind and memory.

Mrs. Bodman, between whom and the deceased an acquaintance had existed for more than twenty years and who was his nearest neighbor at the time of his death, called on him frequently during his illness in January. She testified that she never saw him when she thought him otherwise than sound in mind and memory. Mr. Ezra Post, who had known him somewhat intimately for a like period of years, and attended and waited upon him for two weeks during his

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illness in January, testified that he never had cause to doubt his mental capacity. That if awakened suddenly from sleep induced by morphine his look was vacant and his mind dormant, but that he would soon recover and be himself again. This witness testified that he was there as an attendant upon the deceased before and after Dr. Vance began to treat him and that he advised that Dr. Vance be called to the aid of the testator who was prescribing for himself. That after Dr. Vance's first visit, which was on the 10th of January, the deceased transacted business and settled business affairs with different persons on different occasions in presence of the witness and that he was fully capable of attending properly to such matters.

Mr. George Grant, who was a contractor and builder, completed a house for the testator in January, 1891, and had a final settlement of the contract and business matters connected therewith with the deceased on the 13th of January, 1891. As a witness Mr. Grant testified that the deceased fully comprehended the settlement and adjusted the same with the ability men usually displayed in such affairs.

Mr. Grant gave a detailed account of his interview and settlement with deceased. It appeared in the course of the settlement, that Mr. Grant was indebted to merchants and lumber dealers for hardware and building material used in the construction of the house, and the deceased signed checks upon the bank, payable to such merchants and dealers respectively for the proper amounts due each, in order that all liens upon the building might be discharged, and then signed a check payable to Mr. Grant for the amount remaining due to him as the contractor. Work not contemplated or covered by the contract for building had been performed by the contractor, for which bills in excess of the contract price were presented, discussed, and adjusted by the parties in a business-like manner. The mental powers of the deceased were, in the opinion of Mr. Grant, wholly unimpaired. The transactions with Mr. Grant occurred on the third day after the execution of the codicil.

Judge W. G. Cloyd, who had known the testator for

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ceased was of unsound mind and incapable of making a codicil, or will, to be manifestly against a clear preponderance of the evidence.

It is alleged by an amendment to the original bill of complaints, that an alteration was made in the paper writing, purporting to be a codicil, after its alleged execution, changing its provision in a material and substantial manner, without the knowledge or consent of the testator.

Proof pro and con upon this point was submitted. It is urged that the jury may have rejected the codicil because they regarded the allegations of the bill in relation to such alterations sustained by the proof. The bill does not charge that such alterations were made fraudulently by some persons interested in and benefited by the change. Alterations in a will or other instruments, if made by a stranger to it, are but spoliations and do not operate to avoid the will or instrument thus mutilated or defaced. Redfield on Wills, Chap. 7, Sec. 43-6; Wait's Actions and Defenses, 472.

"The law desires to put into execution the will of a deceased person, and if it has been altered without fraudulent intent or by one not interested in its provisions, will enforce it as originally written, if its original condition can be ascertained." Redfield on Wills, Chap. 7, Sec. 40; 1st Amer. & Eng. Ency. of Law, 522.

The presumption as to interlineations or erasures in a will is that they were made after the execution of the will. Redfield on Wills, Chap. 7, Sec. 23-24.

If made by the testator and not re-attested, interlineations or erasures have no legal effect; but it being presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute, and the attempted alteration having failed for want of legal authentication, the will, if its original reading can be made out, will stand in force as first written, and if its original wording can not be determined, it will be enforced in all other parts, the illegal portions being treated as blanks. Wolf v. Botlinger, 62 Ill. 368.

In no view that could be taken could this codicil in the

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case at the trial and of the importance of the issues made and shown to the jury.

Sheet B was in the handwriting of the deceased and bore his signature at its conclusion and though not dated we think it satisfactorily proven that it was written by the deceased after the execution of the original and before the attestation of the codicil. It purported to be part of his will, but was not signed by attesting witnesses. The evidence tended to show that the intestate attached or attempted to attach sheet B and the codicil to the original will. It was proven that he placed them all in an envelope, which he deposited with Wm. C. Camp, the executor named in the original will, at the same time telling him that the envelope contained his last will. The plaintiff in error offered to prove by the executor that Dr. Swaney, in December, before his death, during the course of a conversation between them, pointed out this sheet B as being a part of his will, and that at that time, sheet B, the original will and the codicil were in the possession of the intestate and were fastened together. The court, upon the objections of the defendant in error, refused to allow such testimony to be heard by the jury, to which ruling the plaintiff in error excepted. Whether the court regarded the witness as incompetent, or the subject-matter of the proof offered immaterial, is not clear to us. The witness was not incompetent merely because he was a party to the proceeding. At the common law it was competent for the defendant in a chancery proceeding to testify in behalf of a co-defendant, provided the witness was disinterested in the matter about which he was called to testify. Our statute makes no change in this common law rule. *Bradshaw v. Combs*, 102 Ill. 428; *McKay v. Reiley*, 135 Ill. 589. The witness had no interest in sustaining sheet B as part of the will. Its provisions did not affect him injuriously or otherwise. He was competent to speak as a witness. We think that if, after the execution of the original will, the deceased wrote sheet B and attached it to the will, intending it to operate as a codicil to his will, but did not acknowledge it or cause it to be attested and after-

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ward executed, and acknowledged the codicil and fastened it, sheet B and the will together, that the codicil operated as a publication and due execution of the sheet B and the will, all speaking from the date of the codicil. 3 Amer. & Eng. Ency. of Law, page 303, note 8. Hence the testimony offered was pertinent and material to the issue and should, in our opinion, have been admitted.

The bill of complaints filed by the defendants in error specially attacked sheet B, and denied that it was a part of the will, but alleged that it was a loose and separate sheet of paper which had never been witnessed or executed as a will by the testator. Norman Camp, legatee under sheet B, was made defendant to the bill, and it was quite sufficient that he, by answer, made an issue as to said sheet B. The original will and the codicil were admitted to probate. Had the defendants in error confined the attack to these instruments, no doubt a cross-bill would have been the appropriate pleading to raise the question of whether sheet B was a portion of the will.

Because we think the finding of the jury as to the codicil was against the weight of the testimony, and the evidence offered in support of sheet B was improperly excluded, the decree must be and is reversed and the cause remanded for further proceeding conformable to this opinion.

**David Ross v. Edward Hamer and Jesse Bogue,
Assignees, etc.**

1. *APPEAL—From Void Judgments.*—A court has power to grant an appeal from a void judgment.

Memorandum.—Voluntary assignments, etc. Appeal from the Circuit Court of Fulton County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded with directions. Opinion filed October 28, 1893.

The opinion states the case.

BAILY & HOLLY, attorneys for appellant.

GRAY & WAGGONER, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellant filed a petition to the County Court for an order to appellees, as assignees under the insolvent act, to pay him a certain debt in full, for reasons of law and facts therein stated. It was contested, but granted, and the order made, from which they appealed to the Circuit Court, where it was heard *de novo* and a judgment entered dismissing the petition. From that judgment this appeal was taken.

After the case was submitted we were asked to dismiss the appeal because the court below had no jurisdiction of the subject-matter. That is true. *Union Trust Co. v. Trumbull*, 137 Ill. 146. But we did not consider it a good reason for allowing a void judgment to stand. The court below had power to grant an appeal from it. We can not now consider the subject-matter further than to determine the question of its jurisdiction, because it is not properly before us by direct appeal from the County Court. But the judgment of the Circuit Court is properly before us, and for the reasons stated it will be reversed and the cause remanded with direction to dismiss the appeal from the County Court.

Daniel Mulcahey, Jr., et al., v. Fannie Strauss.

1. APPELLATE COURT PRACTICE—*Raising Questions for the First Time.*—In foreclosure proceedings the question as to whether a defendant should file a cross-bill or bring a separate suit to determine his rights, can not be raised for the first time in the Appellate Court.

2. MORTGAGE FORECLOSURE—*Solicitor's Fees—Costs.*—Where a mortgage provided that in case of foreclosure a fee of \$50 should be taxed, the fee was properly taxed as a part of the costs on the foreclosure.

3. FORECLOSURE—*Decree Requiring Mortgage Debtor to Pay Deficiency.*—It is not error to provide, in a final decree of foreclosure, that the mortgage debtor be released from any personal obligation for the payment of the mortgage debt, where the facts and peculiar circumstances of the case require it.

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4. REMITTITUR.—*In Foreclosure Proceedings.*—Where, in foreclosure proceedings, the decree is rendered for an amount in excess of the sum due, the error may be cured by a remittitur.

Memorandum.—Foreclosure of mortgage. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

FRANK R. HENDERSON, attorney for appellants.

JOHN STAPLETON and WILLIAMS & CAPEN, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure.

It is objected, 1st, that the bill was not maintainable.

This position is based upon the fact that the property had been placed in the hands of a receiver in a proceeding pending in the same court, on the chancery side thereof, wherein Daniel Mulcahey Sr., was complainant and said Daniel Mulcahey, Jr., and others, including the appellee, were defendants.

That controversy was, in effect, between the Mulcaheys, Sr. and Jr., as to the ownership of the land subject to the lien of the mortgage, which was not disputed. It is not necessary to state in detail the points involved in that suit, or to follow the course of proceedings thereon.

Suffice it to say that the result was to leave the title in Daniel Mulcahey, Jr., subject to the mortgage, and also to a declaration of trust in favor of his mother and brothers and sisters.

Appellants insist that because the property was placed in the hands of a receiver before the mortgage debt was due, the obligation of the mortgage debtor was suspended, or transferred to the receiver, and therefore the failure to pay was not the fault of the mortgagor; hence the bill was prematurely filed. We think there is nothing in this position. The mortgage ought not to be delayed because of this controversy.

It is also urged that the appellee was in contempt of court in bringing this bill without leave of the court.

Whether this be so or not it is no objection to the decree. The jurisdiction to render the decree is not thereby affected.

The point is made also that the proper course to pursue was to file a cross-bill in the suit first begun, and that there was no need to bring this suit. We are not inclined to take this view—but it seems clear that whatever force there might be in the point, it can not be presented for the first time in this court.

2d. It is objected that the decree is erroneous in requiring Daniel Mulcahey, Jr., the mortgage debtor, to pay any deficiency remaining after the sale of the mortgaged premises.

This is based upon the position that the decree in the bill filed by Daniel Mulcahey, Sr., released the mortgagor from personal liability in respect to the mortgage debt.

The provision of the decree relied on is as follows:

"It is further ordered and decreed that said Daniel Mulcahey, Jr., convey said real estate in said original bill described to Daniel Mulcahey, Sr., with covenants of warranty against any incumbrances on said land that were put there by the said Daniel Mulcahey, Jr., except the mortgage given for the purchase money to Fannie Strauss, which said mortgage by the terms of said deed the said Daniel Mulcahey, Sr., is to assume and agree to pay, and that said Daniel Mulcahey, Jr., be released from any personal obligation for the payment of said mortgage."

It will be seen that this provision requires a conveyance of the land from the mortgagor to Mulcahey, Sr., who assumes the mortgage debt and in this connection and for this reason the mortgage debtor is "released from any personal obligation for the payment of said mortgage."

It appears from the record that at a later date this decree was opened and modified so as to grant a divorce to Julia Mulcahey against Daniel Mulcahey, Sr., and that on the same day the latter conveyed the land back to Daniel Mulcahey, Jr., the original mortgage debtor, and also on the same day the declaration of trust before mentioned was

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executed by the latter affecting the said real estate and certain personal property in which he declared that he held said real and personal property in trust to pay the mortgage debt then on said premises.

One effect of receiving the deed from Daniel Mulcahey, Sr., and of making this declaration of trust, must be to cancel so much of the decree as transferred the liability to pay the mortgage from Daniel Mulcahey, Jr., to Daniel Mulcahey, Sr., and to place these parties in *statu quo* with respect to this indebtedness.

We are of opinion the error assigned upon this branch of the case must be overruled.

3d. It is objected that the court improperly allowed as a part of the cost the sum of \$50 for the fees of the complainant's solicitor.

This allowance is based upon and supported by a distinct provision in the mortgage, and the only objection is that the mortgagee had no occasion for the services of a solicitor.

The mortgage provided that in case of foreclosure the fee should be taxed.

There was a foreclosure, and the services of the solicitor were indispensable.

This objection must be overruled.

4th. It is objected that the decree is too large by \$16.74, which is met by a remittitur of \$16.66.

We think it not necessary to determine which of these amounts is correct but as the difference is so trifling will accept the remittitur as a sufficient answer.

The decree will be affirmed.

Milton Garretson v. Louis Becker.

1. VERDICTS—*When Not to be Disturbed.*—In cases where the testimony is conflicting and that produced in behalf of the plaintiff is sufficient to justify the finding, a verdict of the jury is not to be disturbed by a reviewing court on the ground of insufficiency of the evidence.

2. INSTRUCTIONS—*May Assume Facts Not Controverted.*—An instruction may assume facts which are not controverted.

3. *SEDUCTION—Action at Common Law—Damages.*—The common law gave the father an action for the seduction of his daughter upon the ground alone that he was entitled to her labor and services, and by the seduction had lost them. The measure of his damages was only such as resulted from the disabling physical injury to the servant.

4. *SEDUCTION—The Action in Illinois—Damages.*—In actions for seduction the father must prove that the relation of master and servant existed, but it is little more than a legal fiction, and proof of the nominal relation of master and servant is sufficient to give the father a standing in court. Proof of the slightest service is sufficient, and when proven and the cause otherwise established the extent of the recovery is not limited to the value of the services lost to the parent as a master, but the shame and mortification of the father, the injury to the good name and character of the family of which he is the head, and the mental suffering of the father because of the dishonor to his family, are proper elements of damage.

5. *SEDUCTION—Age of Person Seduced.*—In actions for seduction the age of the daughter is immaterial. If a minor and unmarried the father is entitled to her services. The relation of master and servant need not be otherwise proven. If an adult, it must appear that she resided in the family, and there must be some proof of slight acts of service, and if such be proven the age of the daughter is immaterial.

Memorandum.—Action for seduction. Error to the Circuit Court of Hancock County; the Hon. CHARLES J. SCHOFIELD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

Plaintiff's instructions assigned for error:

2. The court instructs the jury that if you find for the plaintiff, then besides the loss of services, you can give such additional damages for wounded feelings, mental suffering, and for the dishonor of the plaintiff and his family as you shall deem from the evidence to be compensation therefor.

5. The court instructs the jury that under the law of this State a female can not bring an action against her seducer for damages resulting from the seduction, but an action can be brought by the father for the seduction of his daughter, and for the loss of her services, and it makes no difference what the age of the daughter is, provided she was, at the time of the seduction, residing with him, and was a part of his household and rendering him services, and provided, also, the father in no manner consented to the seduction, and has been deprived in any degree or manner of her services by reason of the seduction. And if the jury believe from the evidence that Rosetta E. Becker is the daughter of the plaintiff, and that the defendant in the year 1890 seduced and had sexual intercourse with her, and that she became pregnant and was delivered of a child as the result of such sexual intercourse, and that at

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the time of such seduction and intercourse she resided with the plaintiff and was a part of his household, and that she rendered services for him either at his house or at his store, and that because of such pregnancy and the delivery of said child, the plaintiff was deprived of her services, and if you shall find that the plaintiff, Louis Becker, in no manner consented to such seduction or sexual intercourse, then you shall find for the plaintiff, and in such case it makes no difference how old Rosetta E. Becker was, at the time of such sexual intercourse.

O'HARA, SCOFIELD & HARTZELL, and J. W. MARSH, attorneys for plaintiff in error

WILLIAM N. GROVER, TRUMAN PLANTZ and CHAS. R. YOUNG, attorneys for defendant in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The action was case, brought by defendant in error to recover damages for the alleged seduction of his daughter by plaintiff in error.

The judgment upon the verdict of the jury was for the defendant in error in the sum of \$1,700. The errors assigned are (1) that the verdict is not supported by the evidence; (2) the court erred in giving instructions No. 2 and 5, given in behalf of the defendant in error; (3) that the damages are excessive.

☛ We were favored in this case with able and exhaustive oral arguments of counsel in addition to the printed briefs and arguments, which are full and complete. Counsel and client may feel that nothing has been left undone to bring the facts and law of this case fully before the court. We have read carefully the testimony submitted to the jury by the respective parties. It is contradictory and conflicting, and the weight and value of much of it depended upon the credit given to certain witnesses who either testified falsely or were grossly mistaken.

The judge and the jury who tried the case in the Circuit Court, and there saw the different witnesses and heard them testify, had advantages vastly superior for the ascertainment

of truth and the detection of falsehood, error or mistake, over this court sitting as a court of review, and having before it only the words of the witnesses in writing in the record. It is not complained that improper testimony was received or proper proof rejected. The evidence produced on behalf of the defendant in error, if accepted as true, and believed, as it seems to have been by the jury, seems to us amply sufficient to uphold the verdict. It would serve no good or useful purpose to refer to it in detail and could not but be unpleasant to all persons concerned to have a recitation of the testimony in behalf of the plaintiff printed in a book of the opinions of this court. We therefore forbear to say more than that the evidence submitted to the jury was conflicting; that it was the peculiar province of the jury to reconcile it if possible, and to believe and credit one witness and discredit and disbelieve another as they found reason so to do; that the evidence produced in behalf of the plaintiff was sufficient to justify the finding and that when all this is true a verdict of the jury is not to be disturbed by a reviewing court on the ground of insufficiency of the evidence. *I. C. R. R. Co. v. Gillis*, 68 Ill. 317; *Calvert v. Carpenter*, 96 Ill. 63.

The objection to instruction No. 2 is that it, as counsel insists, assumes that the defendant in error lost the services of the daughter and erroneously directs the jury that the mental suffering of the entire family of the defendant in error (which counsel suggests includes the daughter who was seduced), might be taken into consideration as an element of damages if they found for the plaintiff below. It was proven and not contradicted that the daughter was a member of the plaintiff's household, that she rendered services to some extent as a housekeeper and also as a clerk in his business as a retailer of dry goods, groceries, etc., and likewise it appeared, without contradiction, that in consequence of the seduction she became pregnant, the mother of a child, sick, etc., etc., and therefore unable to work.

The instruction only assumed as being true, facts that were uncontroverted, which may be properly done.

The instruction will not bear the construction put upon it by counsel as to the elements of damages. It does not authorize the jury to consider the mental suffering of the girl who was seduced.

The instruction is that "besides loss of service you may give such additional damages for wounded feeling, mental suffering, and for the dishonor of the plaintiff and his family as you may deem compensation therefor under the evidence."

The common law gave the father an action for the seduction of his daughter upon the ground alone that he was entitled to, and by the seduction had lost her labor and services and the measure of his damages was only such as resulted, from the disabling physical injury to a servant. While we yet preserve the old doctrine that the father must prove that the relation of master and servant existed, yet it is little more than a legal fiction, and proof of the nominal relation of master and servant is all that is required to give the father a standing in the courts. Proof of the slightest service is sufficient (*Doyle v. Jessup*, 20 Ill. 460; 21 Eng. & Amer. Ency., 1010, 1011 and 1012); and when proven and the cause otherwise established, the extent of the recovery is not limited to the value of the services lost to the parent as a master, but the shame and mortification of the father, the injury to the good name and character of the family of which he is the head, and the mental suffering of the father because of the dishonor to his family, are proper elements of damage. *Yundt v. Hartrunft*, 41 Ill. 9; 21 Amer. & Eng. Ency., 1010, 1011 and 1012.

Tested by these views the instruction is not open to criticism.

Instruction No. 5 does not, as counsel for appellant urge, instruct the jury that "it makes no difference what the age of the daughter is," but the instruction is that the age of the daughter is unimportant, providing "she was residing with him as a part of his household and rendering him service," etc. If the daughter is a minor and unmarried, the father is entitled by law to her services, and the

relation of master and servant need not otherwise be proven. If the daughter is an adult it must appear that she resided in the family of the father, and there must be some proof of slight acts of service, and if such be proven the age of the daughter is immaterial. The instruction was properly given. 21 Amer. & Eng. Ency. of Law, page 1016, and cases cited, note 2.

As no reason appears demanding the reversal of the judgment, it is affirmed.

Daniel Selover v. D. L. Osgood.

1. STOCK—*Running at Large—The American Law Rule.*—The common law rule requiring the owner of cattle to keep them upon his own premises is in force in this State except in counties or towns where the people by affirmative vote, authorized by our statute to be taken, have decided to let stock run at large.

2. STOCK—*Running at Large Under the Statute of Division Fences.*—The statute requiring the construction of partition fences by adjoining land owners abrogated the common law rule that no man is required to fence his land against the cattle of others, as to the owners of inclosed adjoining fields, and cast upon such owners the burden and duty of erecting and maintaining a just proportion of the fence separating their estates.

3. STOCK—*Every Man Answerable for Trespasses at Common Law.*—The common law rule that every man should be answerable for the trespasses of his stock rested upon that other rule of the common law that no man was required to fence or inclose his land against the stock of another.

4. STOCK—*The Common Law Rule That Every Owner Should Keep His Stock on His Own Premises Abrogated.*—With the abrogation of the common law rule, that every man is answerable for the trespasses of his cattle, fell also, as to adjoining owners, that other common law rule that rested upon it, that every man shall keep his stock on his own premises at his peril.

5. STOCK—*Rights of Adjoining Land Owners.*—After the establishment of a partition fence under the statute each owner is required to rely for the safety of his property against the animals of the adjoining owner upon the partition fence required by law to be maintained.

6. PARTITION FENCE—*Maintained by Joint Expense.*—If adjoining owners keep up the whole line of division fence by a joint expenditure of labor or money, neither can recover damages for the trespasses of stock from the other on the ground that the fence was not good and suf-

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ficient, because the default was not that of one more than the other. Under such an arrangement each is responsible for all parts of such a fence.

7. **TRESPASSES OF CATTLE—Adjoining Owners—Burden of Proof.**—In order to recover for trespasses occasioned by stock passing through a division fence, certain portions of which are to be kept up by each proprietor, the injured party is required to show either that the stock passed through that portion of the fence which it was the duty of the other land owner to maintain and which duty was omitted or neglected, or that the stock passed through his own portion of the fence at a point where such fence was good and sufficient to turn stock.

Memorandum.—Action for trespass begun before a justice of the peace and appealed to the Circuit Court of Hancock County, and appealed therefrom; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

FRANK HALBOWER and MANIER, MILLER & WILLIAMS, attorneys for the appellant.

O'HARA, SCOFIELD & HARTZELL, and D. MACK & SON, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action begun before a justice of the peace by the appellant, to recover for damages done to his hay and pasture lands by cattle belonging to the appellee. It came into the Circuit Court by appeal and was there determined adversely to the appellant. Hence this appeal. Cattle belonging to the appellee, passed through a hedge fence which divided adjoining premises of the parties, consumed a stack of hay belonging to appellant, and injured and damaged his meadow and pasture. This much was proven beyond dispute, and indeed is, as we understand, conceded by the appellee.

The appellant insists that the law is as at the common law, that the appellee was required to keep his cattle on his own premises or be answerable for their trespasses, and that therefore, under the undisputed facts of the case, he should

have recovered. That the common law rule referred to is in force, except in counties or towns where the people by an affirmative vote, authorized by our statute to be taken, have decided that stock should run at large, and except under certain other circumstances, which we shall hereafter more fully refer to, is undisputed. We so expressly held in the case of *Bulpit v. Matthews*, 42 App. 561, which holding has been affirmed by our Supreme Court in the same case on appeal. (145 Ill. 345.) Our General Assembly in 1857, by an enactment, which will be found on page 159 of the Session Laws of that year, and which by re-enactment is now in force, required the owners of adjoining premises to make and maintain a just proportion of the division fence between their lands unless one of them should choose to let his lands lie open. The common law rule that every man was answerable for the trespasses of his stock rested upon that other rule of the common law that no man was required to fence or inclose his land against stock.

The statute requiring the construction of partition fences by adjoining land owners abrogated the last mentioned common law rule as to the owners of inclosed adjoining fields, and cast upon such owners the burden and duty of erecting and maintaining a just proportion of the fence separating the premises. With the abrogation of that rule fell also as to such adjoining owners the other common law rule that rested upon it, that every man should keep his stock on his own premises at his peril, for the obvious reason that as to such adjoining premises the law required the land owner to maintain a good and sufficient fence to protect their premises against stock which might be in the adjoining field. The duties, obligation and rights of such adjoining owners must be determined under the statute if they have a partition fence. After the establishment of a partition fence, under the statute each owner was required to rely for the safety of his property against the animals of the adjoining owner upon the partition fence required by law to be maintained. If such owners keep up the whole line of division fence by a joint expenditure of labor or money, neither can

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recover damages for the trespasses of stock from the other on the ground that the fence was not good and sufficient, because the default was not that of one more than the other. Each is responsible for all parts of such a fence.

In order to recover for trespasses occasioned by stock passing through a division fence, certain portions of which are to be kept up by each proprietor, the injured party is required to show either that the stock passed through that portion of the fence which it was the duty of the other land owner to maintain, and which duty was omitted or neglected, or that the stock passed through his own portion of the fence at a point where such fence was good and sufficient to turn stock even to some extent unruly.

In support of the views thus announced consult *McCormick v. Tate*, 20 Ill. 334; *D'Arcy v. Miller*, 86 Ill. 102. In the case at bar there were no written pleadings and we can not know upon what ground or claim of right the appellant asserted a right to recover except as we may be informed by the facts he sought to establish by the proofs introduced by him.

We know the parties hereto occupied adjoining inclosed lands, and that the statute required each of them to maintain a just proportion of the fence separating their fields. We know that unless each party was maintaining certain separate portions of the fence and not responsible for the entire line thereof, neither could recover against the other for damages attributable to the insufficiency of the fence.

If each proprietor was maintaining distinct portions of the fence then we know that the appellants might recover by showing (1st) that the cattle passed through that portion of the fence assigned to him to maintain, and that it was then and there a good and sufficient fence, or (2d) that the animals passed through that portion of the fence which it was the duty of the other proprietor to maintain, and that the fence there was not good and sufficient. Except upon one or the other of these grounds the appellant could have no right of recovery.

Knowing this much, we may as readily determine his

cause and ground of action from the evidence produced in his behalf as we could from the declaration, had he instituted his action in a court of record and formally set out his complaint.

He appeared first as a witness in his own behalf.

After stating that the cattle got upon his premises by breaking through a hedge fence separating his pasture from the field of the appellee and destroyed a ton of hay and damaged his meadow by trampling it while the ground was wet, he proceeded to state that the hedge which composed the fence had grown up thick and strong and thrown out branches and bushes, so that cattle could not get near to or through it; that it was a good fence, the only good fence along the line of division fence. His counsel asked him to "describe the fence as to its sufficiency to turn stock at the place where the cattle got in." His reply was, "they broke out green hedges to get through; one place looked like they had been run through. I say the fence was perfectly safe where they broke through," etc., etc. Six witnesses were introduced in his behalf, of whom five testified solely as to the character and sufficiency of the hedge as a fence, and the other witness testified that cattle had been kept safely in the field by the hedge. This was the case presented to the jury by the appellant. Beyond doubt he based his right of action and his cause upon the theory that the cattle had passed through that portion of the fence which he was to maintain, and that it was a good and sufficient fence to turn such stock. The appellee did not attempt to deny that his cattle went through the fence onto the lands of the appellant, nor that they inflicted injury and damage to appellant's hay and pasture, but he met the case made by the plaintiff as to the sufficiency of the fence—that is, contended that the appellant did not have his portion of the partition fence sufficiently good and strong to turn the cattle. The appellee produced a number of witnesses who testified as to the character of fence made by the hedge.

This was the case and the issue that was submitted to the jury, who returned a verdict for the appellee. The evidence

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was conflicting as to the questions of fact in issue; the burden was upon appellant; the instructions given by the court as to the law were orally pronounced and not preserved in the record and not objected to, and therefore the verdict of the jury must be accepted as a final determination of the controversy.

The judgment is affirmed.

Philip S. Judy, Jr., v. Amanda S. Sterrett.

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1. BREACH OF PROMISE OF MARRIAGE—*Immoral Consideration*.—A promise of marriage founded upon the consideration of illicit sexual intercourse is void.

2. CONTRACT OF MARRIAGE—*May be Implied*.—An express and formal promise is not necessary; a promise may be inferred from the language, conduct, and relations of the parties.

3. CONTRACT OF MARRIAGE—*Acceptance*.—An acceptance of a promise of marriage may be inferred from circumstances the same as a promise to marry.

4. SPECIAL FINDINGS—*Restricted to Ultimate Facts*.—Special findings should be restricted to ultimate facts, so held in an action for breach of promise to marry where the court was asked to submit the following interrogatories: Did the defendant promise to marry the plaintiff? which was submitted. Question No. 2 was: If you have answered "Yes" to question 1, then when and where did he make the promise? which was not submitted. *Held*, it was properly refused.

5. SPECIAL FINDINGS—*Province of the Jury*.—It is unreasonable and impracticable to require juries to reduce to writing the evidence upon which they base their conclusions upon ultimate facts; as, to state time when, and place where, litigants entered into agreements.

6. CONTRACT OF MARRIAGE—*No Time Fixed—To Marry upon Request*.—If a contract of marriage is made and no definite time fixed for its consummation, in law the contract is one to be performed in a reasonable time, and if a contract is made to marry upon request, the plaintiff may make such request by an agent, as well as by herself.

7. CONTRACT OF MARRIAGE—*What is Not an Abandonment*.—Where parties to a marriage contract sever their relations as betrothed lovers for a time, and at the request of either they are resumed, no formal new promise of marriage is necessary after such resumption.

8. CONTRACT OF MARRIAGE—*Immoral Consideration and Other Promises*.—The fact that a promise of marriage is made upon an immoral consideration is immaterial where there is evidence that other promises or obligations free from such illicit taint were made or existed, and a right of recovery can not be denied if such other promises are proven.

Memorandum.—Assumpsit for breach of marriage contract. Appeal from the Circuit Court of Hancock County: the Hon. CHARLES J. SCHOFIELD, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

APPELLANT'S BRIEF, AKERS & PETRI AND CARTER, GOVERT
& PAPE, ATTORNEYS.

A promise to marry on the condition that a woman have sexual intercourse with a man, is contrary to public policy and void. 2 Am. and Eng. Ency., 522, 523; 9 Id. 921; 3 Id. 874; Saxon v. Wood (Ind.), 30 N. E. Rep. 797; Wallace v. Rappleye, 102 Ill. 229, 249; 1 Story's Eq. Jurispr. Sec. 296; Greenhood on Pub. Pol., rule 188, p. 201; Bishop on Contr., Sec. 508; Hanks v. Naglee, 54 Cal. 51; Steinfeld v. Levy, 16 Abb. Pr. N. S. (N. Y.) 26; Goodall v. Thurman, 1 Head (Tenn.) 209; Baldy v. Stratton, 11 Pa. St. 316; Forsythe v. State, 6 Ohio 19; Beaumont v. Reeve, 8 Ad. and El. N. S., 483.

If any part of the entire consideration for a promise, or any part of an entire promise be illegal, whether by statute or at common law, the whole contract is void. 1 Parsons on Contr., 6 Ed. *456; Bishop on Contracts, Sec. 487; Saxon v. Wood (Ind.), 30 N. E. Rep. 797; Steinfeld v. Levy, 16 Abb. Pr. N. S. 26; James v. Jellison, 94 Ind. 292; Lodge v. Crary, 98 Ind. 238; Ricketts v. Harvey, 106 Ind. 564.

The defendant may show that he was discharged by the plaintiff's express consent, or by her consent to be implied from her conduct. 2 Am. and Eng. Ency. of Law, 525, 526; Bishop on Contracts, Secs. 812, 837; 2 Parsons on Contracts, *677, *678; Shellenbarger v. Blake, 67 Ind. 75; Grant v. Willey, 101 Mass. 356; King v. Gillett, 7 Mees. and W. 55, 58; Davis v. Bomford, 6 Hurl. and N. 245.

Mere courtship, or even an intention to marry, is not sufficient to constitute a contract of marriage. 1 Wait's Act. and Def., 722; Homan v. Earle, 53 N. Y. 267.

It by no means follows because a gentleman is the suitor of a lady, and visits her frequently, that a marriage engage-

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ment exists between them. If this were so, it would be dangerous for an unmarried man to pay attention to an unmarried woman. *Walmsley v. Robinson*, 63 Ill. 41; *Townsley v. Quinlan*, 17 Ill. App. 610; *Burnham v. Cornwell*, 16 B. Mon. 284.

To make a valid contract of marriage there must be an acceptance of the offer of marriage, or a promise in return; both parties are bound, or neither is; the contract must be mutual. 2 Am. & Eng. Ency. of Law, 521, and cases cited; *Espy v. Jones*, 37 Ala. 379; *Kelly v. Riley*, 106 Mass. 339.

APPELLEE'S BRIEF, O'HARA, SCOFIELD & HARTZELL,
ATTORNEYS.

The acceptance, like the offer of marriage, need not be in expressed words, but may be inferred from the promisee's conduct. Express words need not be proved on either side. It is sufficient if there is shown a definite understanding between the parties. Parties are presumed to intend what their conduct fairly indicates. An agreement to marry may be inferred by the jury from their conduct and treatment of each other, their letters and their habits. 2 Eng. & Am. Ency. 521; *Richmond v. Roberts*, 98 Ill. 472; *Rockafellow v. Newcomb*, 57 Ill. 186; *Blackburn v. Mann*, 85 Ill. 222.

The very words or time or manner of the promise need not be proved, for it may be inferred from circumstances. *Greenleaf on Ev.*, Vol. 1, 62; *Wightman v. Coats*, 15 Mass. 1.

An express promise is not necessary; it may be inferred from the language, conduct and relations of the parties. *Greenup v. Stoker*, 3 Gilm. 202; *Burnett v. Simpkins*, 24 Ill. 264; *Rockafellow v. Newcomb*, 57 Ill. 186; *Blackburn v. Mann*, 85 Ill. 222.

Our courts have held that a contract upon an immoral consideration is void, but there seems to be a disposition to make a distinction as to marriage contracts. The case of *Morton v. Fenn*, 3 Dougl. 211, is cited with approval by our Supreme Court in *Tubbs v. Van Kleeck*, 12 Ill. 446, and the language of Lord Mansfield used therein is quoted and adopted. In that case the evidence was that a man of fortune

in Jamaica, aged seventy, promised to marry the plaintiff, a widow of fifty-three, if she would go to bed with him that night, which she did, and lived afterward with him a considerable time.

It appeared also that the defendant several times afterward repeated his resolution to marry her, but that he afterward married another woman. The jury found a verdict for the plaintiff with \$2,000 damages. A rule *nisi* for a new trial having been obtained on the ground that it was *turpis contractus*, being on condition of the plaintiff going to bed with the defendant, Lord Mansfield said: "The parties were not in *pari delicto*, but this was a cheat on the part of the man."

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by the appellee against the appellant to recover damages for the breach of promise of marriage.

The case was tried before a jury who returned a verdict for the appellee and assessed her damages at \$3,500, and returned also answers to special interrogatories propounded to them, which will be hereafter referred to as occasion may require; upon which verdict the court gave judgment against appellant, who appealed. When testifying in his own behalf the appellant was asked by his counsel: "Did you at any time since you have known Miss Sterrett, promise to marry her? The court, upon the objection of the appellee, refused to permit appellant to answer this question.

This is assigned for error. We think the ruling of the court in this respect wrong, but as the appellant in answer to other questions subsequently propounded was allowed to and did testify that "nothing about marrying was ever talked about between us—nothing of the kind at any time," and upon cross-examination he testified that "he never in his life said a word about marrying her," it seems perfectly clear that the appellant was really permitted to and did state to the jury all that could have been stated, had he been allowed to answer the excluded question. It is next urged

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that the only promise of marriage proven was in consideration that the appellee should permit the appellant to have illicit sexual intercourse with her, and that such an agreement or promise is opposed to public policy and void. At the request of the appellant the court required the jury to answer the following interrogatory:

"6th. Was there any other promise made by the defendant to marry the plaintiff, except the promise that he would marry her if she would have sexual intercourse with him?" The answer of the jury to this question was "yes." We have examined the testimony as found in the record, and are of opinion that whether a promise was made other than the one that was in consideration of sexual intercourse was, in view of all the evidence, a fair question of fact for the jury to determine. To recapitulate the evidence of the appellee as to the conversations between herself and the appellant concerning marriage, or to insert in this opinion extracts from letters written by the appellant to the appellee, or to state the testimony produced as to the conduct and relations of the parties and other facts proven from which a mutual agreement might be inferred, could be of no service to any one and would unduly lengthen the opinion. It must suffice to say that we are not warranted in regarding the finding of the jury as in this respect manifestly against the weight of the evidence.

Moreover, an express and formal promise is not necessary; a promise may be inferred from the language, conduct and relations of the parties. *Rockafellow v. Newcomb*, 57 Ill. 186; *Blackburn v. Mann*, 85 Ill. 222.

And as it is urged that there is no proof of an acceptance by the appellee, of the promise or offer of marriage, it may be as well to here state that an acceptance may be proven and inferred, as may the request or promise to marry. 2 *Amer. and Eng. Ency. of Law*, page 521, and note 4.

The appellant requested the court to submit to the jury for answer, eight special questions of fact; four of which were submitted and answered, but the court refused to submit the remaining four. The action of the court in that

respect is assigned for error. The first question was: Did the defendant promise to marry the plaintiff? This was submitted to the jury. Question No. 2 was: If you have answered "yes" to question 1, then when and where did he make the promise? It was properly refused. It would be unreasonable and wholly impracticable to require juries to reduce to writing the evidence upon which they based their conclusion upon an ultimate fact, and to state time when, and place where, litigants entered into agreements. Special findings should be restricted to ultimate facts. *C. & N. W. R. R. v. Dunleavy*, 129 Ill. 143. The eighth refused question was for the same reason properly refused. The fourth and fifth refused questions, except so far as they were immaterial, were given in the third and sixth questions which were submitted.

Complaint is made that improper instructions were given for the appellee. But two instructions were given in that behalf. The first instructs the jury that a contract of marriage may be proven by direct or circumstantial evidence.

The objection to this instruction does not question its correctness, so far as the abstract legal rule is declared, but the complaint is stated in appellant's brief as follows: "It was the word of the plaintiff against the word of the defendant, and not a case depending on circumstantial evidence at all." The visits paid by the appellant to the appellee, in the apparent character of a suitor, during the years 1889, 1890 and 1891, the fact that he accompanied her to church and to an oyster supper, that he told Lottie Sparks that "He loved the appellee and had loved her from the time he first met her," and the letters written by him to her in which he addressed her as "Darling Nanny," "Dearest Buzz" or "Dear old chum," etc., etc., calls her "little sweetheart," and assures her that "no one has so nearly occupied all of his thought for the last year as she" asks her to "keep my love for yourself," and as an excuse for addressing her in the endearing manner employed by him, says: "If any one else has a better right to address you in such words I would like to know who it is," etc., etc., all of which appeared in

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the proof, are undeniably circumstances which were proper for the consideration of the jury in connection with the testimony of the appellee, and quite sufficient to warrant the court in giving the instruction to the jury.

The second instruction given for the appellee complained of by the appellant is as follows:

"2. You are instructed that under a declaration charging a promise to marry upon request, or within a reasonable time, such request need not necessarily be made by the plaintiff herself, and in this case, if you find from the evidence that there was a valid, subsisting contract of marriage between the plaintiff and defendant, and that no definite time was fixed by the parties in the contract, then the law would presume a contract to marry within a reasonable time; and if you further believe from the evidence that after a reasonable time from the making of said contract and before the commencement of this suit, the plaintiff herself or any one authorized by her for that purpose, called upon the defendant and requested him to marry the plaintiff, and that he refused and neglected to do so, then you should find the issues for the plaintiff."

The counsel for appellant insist that it appears from the testimony of the appellee that after the alleged promise to marry had been made by the appellant, she told him at one time not to come back to see her again and sent him away; that he did not visit her, or write to her again for nearly a year, and that this constituted an abandonment of the contract on her part and operated to release him from all past promises, and that this instruction ignores such abandonment of the contract and directs the jury to find for the appellee, if they found that there was at any time a valid subsisting contract of marriage. The purpose of this instruction, clearly, was to inform the jury that if a contract of marriage be made and no definite time fixed for the celebration of the marriage in law, the contract is one to be performed in a reasonable time, and if a contract is made to marry upon request, that the plaintiff may make such request by an agent as well as by herself. It is true that the instruction

is so inartistically drawn that it is not entirely free from the objection suggested against it.

It is, however, manifest to us that the cause of the appellant was not unjustly affected by this instruction. If it be conceded that the dismissal of the appellant by the appellee ought to be regarded as an abandonment of the contract and as a severance of their relations as betrothed lovers, yet the uncontroverted evidence is that he wrote to her asking to be allowed to "come back;" that she consented, and he came, visited her and wrote letters to her as before.

True, no formal promise of marriage is claimed to have been made after this resumption of the former relations between the parties, nor was any necessary. The parties simply resumed their former relations and obligations at the request of the appellant.

Instruction No. 5 asked by the appellant and refused, ought not have been given. By it the court was asked to instruct the jury that if the appellee rescinded the contract by refusing to allow the appellant to visit or see her for about a year that she could not recover, except upon proof that appellant made another promise of marriage, after he was allowed to return to her. If we are right, a formal new promise was not necessary to restore the parties to their former position or to revive the obligations that had been previously entered into. The court ruled correctly in refusing instructions No. 6, 7, 8, 9 and 17, asked by appellant. Each of these instructions advised the jury that if they believed that the defendant promised the plaintiff to marry her in consideration that she would have sexual intercourse with him, such promise was void and that the verdict must be for the defendant. These instructions were not refused because they announced the rule that a promise of appellant to marry appellee on condition that she would have carnal, illicit intercourse, could not be enforced, but because each of the instructions directed the jury to find a verdict for the defendant if such a promise was proven.

That a promise was made on that immoral consideration was admitted by the appellee, but the evidence tended to

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show, and as the jury found, did show, that other promises or obligations, free from such illegal taint, were made or existed, and a right of recovery could not be denied if such other promises were proven. Therefore the direction of each of the instructions in question to find for the defendant if an illegal promise was proven, vitiated them.

The jury found specially that the appellant made other promises than the one based upon the illegal consideration. So it is clear that the appellant was not convicted by the jury upon the void contract mentioned in any of the refused instructions. We think the criticism upon the action of the court in modifying appellant's instruction No 17, hypercritical, but, however that may be, the finding of the jury that the appellant made promises of marriage other than the promise that was based upon her consent to have sexual intercourse with him, disposes of all substantial objections that might be urged against the modification.

We listened with pleasure to an exhaustive review of the merits of this case presented by oral arguments of counsel for the respective parties, and in addition thereto have carefully examined the evidence as preserved in the bill of exceptions, and considered the legal points raised by counsel, and are of the opinion that there is no such error in the record as to demand a reversal of the judgment. It is therefore affirmed.

**Charles M. Grammer, Administrator with the Will
Annexed of Seth W. Grammer, Deceased, v.
Charles Grammer.**

1. *LIMITATIONS—Pleading the Statute of Nebraska.*—To an action upon a promissory note, dated November 1, 1884, due two years thereafter, no place of payment being designated, a plea of the Nebraska statute of limitations, alleging that the note was executed and delivered to the payee in that State, and that the maker was then, and ever since had been a resident of that State, but does not aver where the payee then or afterward resided, presents no defense to the note.

Memorandum.—Assumpsit on promissory note. In the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Judgment on demurrer to a plea of the statute of limitations. Appeal by defendant. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

Copy of note sued on:

\$225.00

NOVEMBER 1st, 1884.

Twenty-four months after date, I promise to pay Seth W. Grammer, or order, two hundred and twenty-five 00-100 dollars for value received, to bear eight per cent interest from date until paid. If the interest is not annually paid, to become as principal, and bear same rate of interest, negotiable and payable without defalcation or discount.

CHARLES GRAMMER.

Copy of plea of the Statute of Limitations:

Now comes the said defendant, by L. E. Emmons, Jr., his attorney, and for further plea says *actio non*, etc., because he says that the several supposed causes of action in said declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of said declaration mentioned, and not different causes of action, and that at the time of the execution and delivery of the said alleged note described in said declaration, and from thence hitherto, he, said defendant, was and has been an actual resident and citizen of the State of Nebraska; that said alleged note was signed and delivered by defendant to said deceased payee on the 1st day of November, 1884, within said State of Nebraska, to wit, at St. Paul, Howard county, in said State of Nebraska, and that said alleged note was there made payable two years after the date thereof, and the same became due and there payable on, to wit, the fifth day of November, 1886, at which time and place last aforesaid a cause of action arose on said alleged note in the said State of Nebraska. And, further, that at the time said note was delivered to said payee, he, said payee, was then at said St. Paul in said State of Nebraska. And defendant further avers that under and by force of the statutes of limitation of the said State of Nebraska, in force in said State at the time when the said alleged note became due and payable as aforesaid, a cause of action on said note in said State of Nebraska would become barred in five years after November 5, 1886, and no action could be maintained on said note in said State for the recovery of a judgment thereon after November 5, 1891.

By means whereof, the said defendant avers that the said supposed cause of action on said alleged note in the first count in said declaration mentioned, became barred on the fifth day of November, 1891, and no suit could be maintained on said note after the date last aforesaid.

And this the defendant is ready to verify, wherefore he prays judgment, etc.

APPELLANT'S BRIEF, L. E. EMMONS, JR., ATTORNEY.

It is an established principle that the construction of personal contracts is to be regulated by, and their validity depends upon the laws of the place where they are made. Edwards on Bills and Notes, 177; Wood on Limitations, 17; Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627; Prentiss v. Savage, 13 Mass. 23; Martin v. Hill, 12 Barb. 631.

The presumption is that the parties have respect to the law of the place where they contract, and that the agreement between them is shaped accordingly. Edwards on Bills and Notes, 177; Thompson v. Ketchum, 8 Johns. 190; Robinson v. Bland, 2 Burr, 1077.

If there be nothing in the contract to indicate that the parties contracted with a view to performance in another country, it is to be carried into execution according to the *lex loci contractus*. Blanchard v. Russell, 13 Mass. 1; Edwards on Bills and Notes, 177.

If the note be drawn, or the bill accepted, payable at large, that is to say, without specifying any place of payment, the instrument should be presented for payment to the maker or acceptor at his residence or place of business. Edwards on Bills and Notes, 495; Degrand v. Banks, 16 St. Louis, 461.

Under the Nebraska statutes, an action on the note in question was, before suit was ever brought thereon, barred in that State; such being the case, the limitation statutes of this State of Illinois intervene and prevent a recovery thereon in an action afterward brought in this State. R. S. Ill., Chap. 83, Sec. 20.

The provision that the time any defendant is absent from this State shall not be counted, and allowing suit after his return, does not apply to non-residents who have never been in the State. Hyman v. Bayne, 83 Ill. 256.

The note sued on was fully barred by the limitation laws of the State of Nebraska, prior to the commencement of this suit, and no action can be maintained on said note within this State. R. S. Ill., Chap. 83, Sec. 20; Hyman v. Bayne, 83 Ill. 256; Hyman v. McVeigh (unreported), 10 Legal News,

p. 157; *Osgood v. Artt*, 10 Fed. Rep. 365; *Bemis v. Stanley*, 93 Ill. 230; *Wernse v. Hall*, 101 Ill. 423.

APPELLEE'S BRIEF, EDWARD SHANNON AND ALMEBON WHEAT,
ATTORNEYS.

The allegations in the plea that the note mentioned in the special count became due and payable in the State of Nebraska, and that when said note became due and payable a cause of action arose thereon in said State, involved, each, a question both of law and fact, and amounted merely to an inference or conclusion of appellant based on the law as it was understood or assumed by him, and in no way aided the plea, or rendered it less obnoxious to the demurrer. 1 Chitty's Pleading (8th Am. Ed.), 215, 540; *Clay F. and M. Ins. Co. v. Westerhausen*, 75 Ill. 285; *Kilgore v. Ferguson*, 77 Ill. 213; *The People v. Village of Crotty*, 93 Ill. 180.

A note becomes due and payable, and the cause of action accrues thereon, in the State, territory or country where the legal holder of the same resides at the time it becomes due and payable, and accrues when default is made in its payment. *Story v. Thompson*, 36 Ill. App. 370, 376; *Chemung Canal Bank v. Lowery*, 93 U. S. (3 Otto) 72.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action upon a promissory note, dated November 1, 1884, due two years thereafter, no place of payment being designated. The defendant pleads the statute of limitations of Nebraska, five years, alleging that the note was executed and delivered to the payee in that State, and that the maker was then and ever since had been a resident of that State, but did not aver where the payee then, or afterward, resided. The Circuit Court sustained a demurrer to the plea, and the only question is upon the point thus raised.

We are of opinion the ruling was correct. *Story v. Thompson*, 36 Ill. App. 370; *Wooley v. Yarnell*, 142 Ill. 442.

The judgment will be affirmed.

Chicago & Alton Railroad Co. v. William K. Rayburn.

52	277
153a	290
52	277
65	278
52	277
175a	303

1. RAILROAD COMPANY—*Rights of Persons Dealing with its Agents.*—A passenger on a railroad train may judge of the power of its agents and servants from appearances and their position and acts.
2. NEGLIGENCE—*Assurances of Safety by Employees.*—The direction or invitation or an assurance of safety given by a servant of a railroad company may so qualify a passenger's act as to relieve it of the quality of negligence.
3. CARE AND NEGLIGENCE—*A Question of Fact for the Jury.*—Whether under all the circumstances a person fails to exercise ordinary care, is a question of fact for a jury, and under the evidence in a case, if the finding of the jury is justified, it is beyond the power of the Appellate Court to disturb it.
4. RAILROAD COMPANIES—*When Bound by the Acts of their Employees.*—While the power and authority of a brakeman is limited by, and can only be determined from, and by the rules and regulations of the company prescribing his duties and defining his power, yet as to third persons, passengers upon a train, the power of such an employe may be determined from appearances and from his acts and from the position he assumes to occupy.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 22, 1893.

STATEMENT OF THE CASE.

The appellee delivered to the appellant a stallion to be transported from Bloomington, Ill., to Eldorado, Kan. He discovered that the door upon the east side of the car in which the horse had been placed would not close, and immediately notified the agent of the appellant of the condition of the door and was directed to see the yardmaster. He went to the yards of the company for that purpose, called the attention of the men who were engaged in making up the train to the door, but before he could find the yardmaster, the car was placed in the train, and he was advised that it would soon start. He was in charge of the horse as groomsman and had a ticket which entitled him to ride upon the train. As the door of the car could not be

closed, he entered the car for the purpose of looking after the safety of the horse, and remained there until the train reached Mason City. There one of the trainmen told him to go back to and ride in the caboose. He told the man of the condition of the door and went to the caboose where his ticket was taken up. He felt anxious about the horse and called the attention of the appellant's servants who were in the caboose to the fact that the door of the stock car needed attention and was told that it would be fixed at the next stopping place. The train left Mason City and stopped next at Tallula on the main track. It was then after nightfall. A brakeman came down from the cupola, and according to appellee's testimony said to him, "Come with me and we will fix the door." This brakeman testified that he said to appellee, "Now I will go and see what I can do with the car," or "I will see if we can fix that door," and that he did not know that the appellee was going with him until after he got off the car and saw him by the light of a lantern. The appellee understood that he was expected to go, and he did go with the brakeman, to the car which held the horse; when there, he and the brakeman engaged in an effort to close the door, and while so employed, the brakeman observed the headlight of an engine which was drawing a train into the switch and directed the appellee to go back to the caboose. The appellee started to obey the directions given, and as he turned about to go back, noticed that he was between the main and switch track, and that the train upon which he had taken passage was in motion on the main track, and that another train was upon the switch moving rapidly toward him. These trains were passing each other, the one upon the main track the other upon the switch, and the appellee was soon between these two moving trains. It was dark and the space between the trains narrow, not above four feet. He was struck and injured by the train that was in motion on the switch. The action was case by the appellee to recover damages for the injuries thus received.

He recovered judgment in the sum of \$2,022.25, to reverse which this appeal is prosecuted.

APPELLANT'S BRIEF, WILLIAM BROWN AND WILLIAMS & CAPEN,
ATTORNEYS.

Appellant contended that in going from the caboose to assist the brakeman in closing the door of the car, the plaintiff was a mere volunteer, and not entitled to recovery for any injuries received while so doing. *Legg v. M. Ry. Co.*, 1 H. & N. 773; *Abrahams v. Reynolds*, 5 H. & N. 143; *Swainson v. N. E. Ry. Co.*, L. R., 3 Exch. Div. 341; *Potter v. Faulkner*, 1 B. & S. 800.

Even if requested by the brakeman to assist him, in the absence of proof of his authority to do so from the company, no action arises against the company for injuries received while rendering such assistance. *Sherman v. H. & St. J. R. Co.*, 72 Mo. 62; *Everhart v. T. H. & I. R. Co.*, 4 Am. & Eng. Ry. Cases, 599; *Flower v. Pa. R. Co.*, 69 Pa. St. 210; *Wood on Master and Servant*, Sec. 455; *Smith on Master and Servant*, 247 *et seq.*; *Legg v. M. R. Co.*, 1 H. & N. 773; *Blair v. G. R. & I. Co.*, 60 Mich. 124; *A., T. & S. F. R. Co. v. Lindley*, 42 Kan. 714; *L. R. & F. S. R. Co. v. Miles*, 40 Ark. 298; *Milligan v. Wedge*, 12 A. & E. 737.

There was no actionable negligence on the part of the servants operating the two freight trains. *I. C. R. Co. v. Frelka*, 9 Ill. App. 605.

It was contributory negligence upon the part of plaintiff to attempt to walk between the tracks when he knew, or could, by the exercise of any care, have known, a train was approaching. *Austin, Adm'r, v. C., R. I. & P. Ry.*, 91 Ill. 35.

Where a passenger voluntarily takes a dangerous position he can not recover, if injury results therefrom. *G. & C. W. R. Co. v. Yarwood*, 15 Ill. 468; *Quinn v. I. C. R. Co.*, 51 Ill. 495; *P. & R. I. R. Co. v. Lane*, 83 Ill. 448; *C. & N. W. Ry. Co. v. Carroll*, 5 Ill. App. 201; *Taylor v. D., O. & O. R. Co.*, 40 Ill. App. 416 (and cases cited there); *Howard v. K. C., F. S. & G. R. Co.*, 37 Am. & Eng. Ry. Cases, 552.

The brakeman had no authority to request assistance from a passenger. Negligence of Imposed Duties, Ray, 253; *Everhart v. T. H. & I. R. Co.*, *supra*; *Sherman v. H. & St. J. R. Co.*, 72 Mo. 62.

The plaintiff was a mere volunteer, consenting at the request or direction of an employe of the defendant (if any such was given), to perform services which should have been performed by the employes themselves; and while he can not be regarded as an employe, he is in no better condition than if he had been.

Nor is he in any better condition legally, than if he had been a mere intermeddler, undertaking to perform the services without request or direction from any one, because, as we have seen, he was not requested or directed to render the assistance, by any one having power from the defendant to authorize him to do so. Everhart case, *supra*; Legg v. Midland R. Co., H. & N. 773; Flower v. Pa. R. Co., 69 Pa. St. 210; New Orleans, etc., R. R. Co. v. Harrison, 48 Miss. 112; Sherman v. H. & St. J. R. Co., 72 Mo. 62.

For a purely accidental occurrence, causing damage without the fault of the person to whom it is attributable, no action will lie, for though there is damage the thing amiss—the *injuria*—is wanting. Cooley on Torts, page 80; Dygert v. Bradley, 8 Wend. 469; Losee v. Buchanan, 51 N. Y. 476; Clark v. Foot, 8 Johns. 421; Sheldon v. Sherman, 42 N. Y. 484; Boynton v. Rees, 9 Pick. 527; Rockwood v. Wilson, 11 Cush. 221; Brown v. Kendall, 6 Cush. 292; Robinson v. Grand Trunk R. R. Co., 32 Mich. 322; Toledo, etc., R. R. Co. v. Daniels, 21 Ind. 162; Indianapolis, etc., R. R. Co. v. Truitt, 24 Ind. 162; Morris v. Platt, 32 Conn. 75; Strouse v. Whittlesey, 41 Conn. 559; Chicago, etc., R. R. Co. v. Jacobs, 63 Ill. 178; Toledo, etc., R. R. Co. v. Jones, 76 Ill. 311.

APPELLEE'S BRIEF, CALVIN RAYBURN AND OWEN T. REEVES,
ATTORNEYS.

The power of the corporation to control and handle its trains with passengers and freight thereon is intrusted to the trainmen in charge of the same; and the corporation is responsible for the acts of its trainmen in the conduct and government of the train, the same as the trainmen themselves would be if they were the owners of the road and

C. & A. R. R. Co. v. Rayburn.

the train. 1 Harris on Dam., Sec. 251, 302; Bass v. C. & N. W. R. Co., 36 Wis. 463; City of Hammond v. N. Y. C. & St. L. Ry. Co., 31 N. E. Rep. 817; Lalor v. C., B. & Q. R. R. Co., 52 Ill. 401; Toledo, P. & W. Ry. Co. v. Harmon, 47 Ill. 298; Philadelphia and Reading R. R. Co. v. Derby, 14 How. 468; Coleman v. N. Y. & N. H. R. Co., 106 Mass. 160; Sullivan v. P. & R. R. Co., 30 Pa. 234; Pennsylvania Ry. Co. v. Vandiver, 42 Pa. 365; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23; Goddard v. Grand Trunk Ry. Co., 57 Me. 202; Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657 (673); Lake Erie & Western Ry. Co. v. Cloes (Ind.), 32 N. E. 588; Pullman's Palace Car Co. v. Laack (Ill.), 32 N. E. Rep. 281.

The plaintiff was on the train in charge of a horse on the same train, and it was his duty to take care of the same, and it was his duty to follow the order or instruction of the brakeman in leaving the caboose and going with him to the car while the train was standing on the track. Chicago, B. & Q. Ry. Co. v. Dickson (Ill.), 32 N. E. Rep. 380; Lake Shore & M. S. Ry. Co. v. Brown, 123 Ill. 162; Patnode v. Warren Cotton Mills (Mass.), 32 N. E. Rep. 161; C. H. R. Co. v. Kassen (Ohio), 31 N. E. Rep. 282; Toledo, W. & W. Ry. Co. v. Harmon, 47 Ill. 298; Penn. R. R. Co. v. McClosky, 23 Pa. 526; Ind. & C. R. R. Co. v. Kent, 3 Otto, 291 (93 U. S. 291); McNulta v. Ensich, 134 Ill. 46.

The duty of the defendant in this case is measured by the peril of the passenger.

Having induced the appellee to leave the caboose for the purpose of closing the car door, the appellant is liable for not giving him sufficient time to re-enter the caboose before the train started to move. Chicago & Alton R. R. Co. v. Fisher (Ill.), 31 N. E. Rep. 406; McNulta v. Ensich, 134 Ill. 46; Chicago & Alton R. R. v. Arnol (Ill.), 33 N. E. Rep. 204; N. Y. C. & St. L. Ry. Co. v. Doane, 115 Ind. 435.

The appellant in this case, while not an insurer of the absolute carriage of the appellee, was bound to exercise the highest degree of care, skill and diligence practically consistent with the efficient use and operation of its train; and

it must be held to the same strict responsibility for the negligence of its servants injuriously affecting the appellee as it would have been if the transportation had been by a train devoted to passenger service exclusively. *Chicago & A. R. R. Co. v. Arnol* (Ill.), 33 N. E. Rep. 204.

The appellant was guilty of negligence in the moving of the train on which the defendant was a passenger while he was between the tracks during the movement of the train, No. 75, going in the opposite direction, and the appellee being injured because of the movement at the same time of the trains in opposite directions was proof of negligence on the part of the trainmen, the plaintiff at the same time exercising due and ordinary care. *Lake Shore & M. S. R. R. Co. v. Hundt* (Ill.), 30 N. E. Rep. 458; *Lake Shore & M. S. R. R. Co. v. Brown*, 123 Ill. 162; *Chicago & A. R. R. Co. v. Becker*, 84 Ill. 483; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *N. W. R. R. Co. v. Hack*, 66 Ill. 238; *Chicago & A. R. R. Co. v. Fisher*, 31 N. E. Rep. 406; *Chicago, B. & Q. R. R. Co. v. Dickson*, 63 Ill. 151; *Chicago, M. & St. Paul Ry. Co. v. West*, 125 Ill. 320; *Powell v. Penn. Ry. Co.*, 32 Penn. 414; *Chicago & A. R. R. Co. v. Arnol*, 32 N. E. Rep. 204.

If appellee made a mistake in following the brakeman to the car, such a mistake does not necessarily imply failure in duty on his part. It is for the jury to determine whether or not the mistake was due to the acts of defendant. *Chicago & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586; *Wabash Ry. Co. v. Elliott*, 98 Ill. 481; *Chicago & A. R. R. Co. v. Traves*, 33 App. 307; *McNulta v. Ensck*, 134 Ill. 46; *Chicago & A. R. R. Co. v. Pittsburg*, 123 Ill. 9; *Tuller v. Talbot*, 23 Ill. 357; *Chicago & A. R. R. Co. v. Wilson*, 63 Ill. 167; *Pullman Palace Car Co. v. Laack* (Ill.), 32 N. E. Rep. 285.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The position of the appellee in the narrow space between two trains which were moving in opposite directions in the darkness, was one of great peril. He bore the relation of passenger to the appellant company and was entitled to ex-

pect and receive from it and its servants the exercise of the highest degree of skill and care to the end that he should not be injured. The company caused its trains to be so set in motion, and if his presence there was also due to or chargeable to it, no reason is perceived why it ought not to be held answerable to him in damages for his injuries.

The peril to which he was exposed was so obvious that it ought, in the exercise of ordinary care, have been anticipated, and injury to him apprehended as a natural or at least probable result. It is insisted that the appellant company is not responsible for his being there.

The brakeman, it is said, had no authority, by virtue of his employment in that capacity, to request or direct the appellee to leave the caboose which the company had prepared for its passengers, and accompany or assist him; it is also said that there is no proof that the brakeman had any special power or authority beyond such as arose by virtue of the capacity in which he acted for the company. Hence it is argued that the appellee was there as a mere volunteer or intermeddler, engaged as of his own choice in assisting an employe of the appellant company in the discharge of a duty which such employe should have alone performed, and therefore not entitled to recover damages for the injury received. The test of his right of recovery was whether, in going to the place of danger, he exercised such care as an ordinarily prudent and cautious man would exercise for his safety. In deciding as to this the jury were warranted in considering not only his acts but also the acts of the brakeman, as an agent of the company, if such brakeman was apparently in discharge of his duty.

It does not appear that the appellee had notice of the authority and duty of the brakeman under the rules and regulations of the company, and in the absence of such notice it is said in *L. S. & M. S. R. R. v. Brown*, 123 Illinois, 162: "Those dealing with a company can only judge of the power of its agents and servants from appearances and the position and acts of such employes."

Whether we accept the version of the appellee or of the

brakeman as to the remark of the latter in the caboose, it is indisputable that the appellee did go with him, and did so because he understood that it was desired at least, if not required, that he should accompany him and assist in securing the safety of the horse. Moreover the jury were warranted by the evidence in believing that the brakeman directed the appellee to go with and assist him.

The brakeman assumed and appeared to be invested with power to act in the premises and did so act, and we see nothing to indicate that a prudent and reasonably cautious man would have questioned his authority or had cause or grounds to suspect or fear that compliance with his request or invitation would lead him into danger.

Under ordinary circumstances no danger attended the proposed undertaking. It is said in *Pierce on Railroads*, 329, that "the direction or invitation or an assurance of safety given by a servant of the company may so qualify the plaintiff's act as to relieve it of the quality of negligence."

Whether, under all the circumstances, the appellee failed to exercise ordinary care was a question of fact for the jury, and under the evidence in the case the finding of the jury is so far justified that it is beyond our power to disturb it. The injury did not arise from a purely accidental occurrence as is suggested, but from the negligence of the company through its servants, in causing the appellee to place himself where he would be exposed to imminent danger from its trains, which it designed to move, and did move, in opposite directions, in such close proximity upon each side of him.

The declarations averred that the appellee was "ordered by the brakeman to alight from the caboose and assist about the door of the car. Counsel for the appellant company insist that the proof at most shows but a "request" to alight and assist, and that there is therefore a fatal variance between the allegations and the proofs. If, as we have seen, an invitation or request was sufficient to relieve the appellee from the imputation that he had failed to use ordinary care, it follows that it is not material whether he acted upon an "order" or "request."

The supposed distinction thus sought to be drawn between an "order" and a "request" forms the chief ground of objections to the instructions given in behalf of the appellee, and does not, therefore, demand further notice.

The refusal of the court to give instructions No. 1, 2, 3, 4 and 5, asked in behalf of the appellant company, and the modifications made by the court in instructions No. 1, 2 and 3 that were given in that behalf, constitute the other ground of alleged error.

We have examined all the instructions given, refused and modified, and do not find that reversible error occurred in the rulings of the court upon them.

The instructions given as a series correctly and fairly stated the law applicable to the case except in so far as those given for the appellant company failed to recognize the doctrine that the power assumed and exercised by the brakeman might be considered by the jury in determining whether the appellee acted with that degree of care demanded of him by the law, but of this defect the appellant can not, of course, complain.

The objections urged against the action of the court in refusing certain instructions asked by the appellant, rest, so far as they are at all important, upon the contention that the brakeman was wholly lacking in power or authority emanating from or binding upon the appellant to act in the matter of requesting or seeking to induce the appellee to leave the caboose or assist in closing the stock car.

The argument in support of such objections proceeds upon the assumption that the power and authority of a brakeman is limited by, and can only be determined from or by the rules and regulations of the company prescribing his duties, and defining his powers; as has been said herein before, our Supreme Court has ruled that in cases such as the one at bar, the power of such an employe may be determined from appearance and from his acts, and the position he assumes to occupy.

We think there is no error in the record demanding a reversal of the judgment. It is therefore affirmed.

Samuel Parr v. Milton Hellyer.

1. **VERDICT**.—*Not Warranted by the Evidence.*—Where a careful consideration of the evidence convinces the court that it ought not to have been regarded by the jury as sufficient to warrant a verdict for the appellee, the verdict will be set aside.

Memorandum.—*Assumpsit.* Appeal from the Circuit Court of Fulton County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed December 22, 1893.

The opinion states the case.

H. W. MASTERS, attorney for appellant.

GRAY & WAGGONER, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This action was begun by the appellee against the appellant to recover the value of two horses, which, as appellee alleged, came to their death through the negligence of a son of the appellant while engaged in the discharge of his duty as a servant of the father. The judgment was against the appellant in the sum of \$190, and he prosecutes this appeal. The case was the same as to each of the horses. Only three witnesses testified as to their value, and all of them estimated the value of the two together, the lowest amount fixed by either witness being \$300.

The verdict for \$190 is inexplicable, unless we indulge in the supposition that the jury were so doubtful whether under the evidence a right of recovery existed at all, they were unwilling to impose the entire loss upon the appellant.

A careful consideration of the evidence has convinced us that it ought not have been regarded by the jury as sufficient to warrant a verdict for the appellee.

The parties were neighboring farmers. The appellee and his family were absent from home temporarily, having ar-

ranged with another neighbor, Mr. Weise, that he would feed and water appellee's stock and milk his cows.

Henry, a son of the appellant, a lad between ten and eleven years of age, by direction of his father, went to the home of the appellee in the afternoon to get a riddle or screen belonging to a fanning mill. Finding no one there the lad opened the door of the appellee's granary, where he knew the screen to be, went in, got the screen and returned to his home. In this granary was a quantity of wheat. Later in the evening Weise and his wife came to the appellee's place to feed his horses and milk his cows. The cows were brought into the lot in which the granary stood and were milked there. A gate led from this lot into an adjoining pasture where the horses in question were running. Weise testified that he endeavored to and thought he had closed this gate so that the cows would remain in the lot; when he returned on the following morning he found the granary door open, one of the cows in the granary, the others in the lot, as were also the horses. He thought the horses had eaten of the wheat that was in the granary. In the evening of that day the appellee returned and found the horses foundered and sick. Both died the next morning. He brought this action to recover their value upon the theory that appellant's son left unfastened or did not securely fasten the door of the granary so that the horses gained access to the wheat, ate of it and died in consequence. The boy testified that he closed and fastened the door and detailed the manner in which he opened and closed it, and secured the latch by which it was held in place when closed. No witness could or did contradict this. Weise testified that he and his wife were about and near the granary, when there in the evening after the boy had gone, but that they did not nor did either of them open the door of the granary. He stated that if unlatched the granary door would hang or swing partly open a foot or so as he expressed it, and that he thought he would have observed it had the door been unfastened, and that he did not notice it. This testimony tended to corroborate the boy's statements. The appellee produced testimony tendin

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to show that a lad of the height of the appellant's son could not have closed and latched the door in the way and manner claimed by the boy.

Witnesses in behalf of the appellant testified that the door could be so closed and latched, and that upon actual experiment it had been so latched and fastened.

Such was the case presented to the jury. Whether the animals gained access to the granary through a failure of the appellant's son to close and latch the door seems to us merely conjectural. It was not proven but only shown that such might possibly have been the case. So it was possible and not improbable nor inconsistent with the evidence that the horses, after having in some way passed through the gate which Weise thinks he closed, found their way into the granary lot, and from thence into the granary, in some manner or through some cause in no wise attributable to the action or non-action of the boy.

The evidence is too slight to warrant a conclusion or justify a judgment whereby the property and earnings of one citizen is to be transferred to and become the property of another. The verdict of the jury, which in effect casts the loss partly upon each of the litigants, indicates quite clearly that they were not ready to hold that the liability of the appellant had been shown. A new trial should have been granted, and because it was denied, the judgment must be reversed and the cause remanded.

Robert Firebaugh v. The Town of Blount.

1. HIGHWAYS—*Suit for Road Tax—How Brought.*—A proceeding against a person for a failure to perform road labor under Sec. 102, Ch. 121, R. S., is properly brought in the name of the town.

2. COURTS—*Presumptions as to Regularity of Proceedings.*—Presumptions of law are in favor of the regularity of proceedings of courts.

Memorandum.—Suit for road tax, originally begun in justice's court. Appeal from the County Court of Vermilion County; the Hon. J. G.

Firebaugh v. Town of Blount.

THOMPSON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 4, 1893.

The opinion states the case.

A. R. HILL, attorney for appellant.

S. G. WILSON, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This proceeding was commenced by complaint of the overseer of highways of Road District No. 4 in said Town of Blount against appellant, before a justice of the peace for failure to perform road labor. R. S. 1891, Ch. 121, Sec. 102. From the justice's judgment an appeal was taken to the County Court. On the trial of the appeal defendant failed to appear. The court instructed the jury only as to the form of their verdict, whether for plaintiff or defendant. The jury found for the plaintiff, assessing the damages at two dollars. Defendant then appeared and entered his motion for a new trial, which was denied. He then moved in arrest of judgment, but in that also was overruled and judgment entered according to the verdict. He brings the record here by appeal, and on the assignments of error urges that appellee failed to establish a *prima facie* case, and that the suit should have been brought in the name of Road District No. 4.

For the latter point no authority is cited, and that the town was the proper party plaintiff appears to be settled by *Bardner v. Town of Chambersburg*, 19 Ill. 99.

The evidence preserved in the bill of exceptions is very meager. It shows that the town clerk testified that he knew the defendant and knew he was assessed for two days' road labor in that district in 1892. The overseer testified that he was such in the summer and fall of that year; that he knew appellant and that he was assessed for two days' road labor in that district for that year; that he served written notice on him to work the roads, and that he did not work. He further stated that he did not have the notice with him, nor

know where it was, nor know exactly the date of its service, but that it was some time in the month of September.

Had the defendant appeared when due we think this evidence, not objected to when offered and aided by the proper presumption, would have been sufficient to put him upon proof of his defense.

It is suggested as possible that the service might not have been made in time or have been in some other respect irregular and insufficient, or that the town may not have adopted the labor system, pursuant to the statute (Sec. 80); but such are not the legal presumptions. Judgment affirmed.

Jacob McVey v. Levin Walls.

1. MASTER IN CHANCERY—*Conclusions on Conflict of Testimony.*—Where the evidence before the master is conflicting his conclusions of fact will in general be sustained.

Memorandum.—Bill to settle partnership. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

F. W. DUNDAS and JAS. A. EADS, attorneys for appellant.

H. S. TANNER and JOE H. WINKLER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant assigns error upon a decree against him for \$84.47 in favor of appellee on a bill filed by the latter for settlement of a partnership in the business of handling grain.

It is objected, 1st, that appellant was entitled to a credit for the value of seventeen hundred bushels of oats; and 2d,

that appellee received credit improperly for \$980, being one-half the profits in a corn transaction known as the Moultrie county corn deal.

The evidence was taken before the master and he reported against the appellant on both these items. The court, upon exceptions to the report, sustained the master in this respect.

There is much conflict in the evidence, but we can not say the conclusion thus reached is erroneous. We are inclined on the contrary to believe it is right. The fact that appellant suffered these items, amounting to some \$1,400, to rest without a claim on his part for several years, and until the bill was filed by appellee, and that the corn transaction really occurred before the partnership, should have no little weight in supporting the position of appellee. We deem it not necessary to state the evidence.

Being of opinion that the decree is responsive to the merits of the case it will be affirmed.

**Rosalie E. Kreitz, Administratrix of the Estate of John
B. Kreitz, Deceased, v. Charles F. A.
Behrensmeyer.**

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1. **OFFICER DE FACTO—Not Entitled to Fees.**—An officer *de facto* holding an office and receiving the fees and emoluments thereof is liable to account for such fees and emoluments to the officer *de jure* who has been excluded from the benefits of the office, and an action will lie to recover the same.

2. **OFFICERS—Certificate of Election—Prima Facie Authority.**—A certificate of election, whether rightfully or wrongfully given by the proper public authority, confers upon the person holding it the *prima facie* right to the office until his right is terminated by a voluntary surrender or by a judicial determination against him.

3. **OFFICERS—Bond and Oath.**—The statute requiring the oath of office and bond to be given within a certain time applies only to persons declared elected, and to whom the certificate of election has been given.

4. **LIMITATIONS—When the Statute Begins to Run.**—It is a general rule that the time limited by statutes of limitation is to be computed from the date when the person entitled is authorized first to commence a suit.

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KREITZ v. BEISENMEYER.

Memorandum.—Claim in probate. Originally filed in the County Court of Adams County; change of venue to the Circuit Court; the Hon. CHARLES P. BOSSNEY, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. *Circuit Court* filed October 26, 1893.

The opinion states the case.

APPELLANT'S BRIEF, H. S. DAVIS AND CARTER, GOVERT & PAPE, ATTORNEYS.

A public office is a mere public agency, created for the benefit of the State. It is not an incorporeal hereditament in this country as in England. It is not a franchise. 92 Ill. 426; *The People ex rel. v. Holtz*, 104 Ill. 321; *Graham v. The People ex rel.*, 111 Ill. 253. It is held neither by grant nor contract. It can not be sold, assigned or incumbered. The term is fixed "with a view of public utility, and not for the purpose of granting the emoluments, during that period, to the office holder."

If, then, the office is not the property of the holder of the legal title, and if the fees established by law are not his property but the property of the county, out of which it must pay a reasonable compensation for necessary services rendered for it, and if there is no privity between the holder of the legal title and the officer *de facto*, upon what legal principle can the right of recovery be based? The salary or compensation itself can neither be sold nor assigned in advance of its being actually earned. *Mechem on Pub. Officers*, Sec. 884; 55 N. Y. 442; *Bliss v. Lawrence*, S. C. 17 Am. Rep. 273.

APPELLEE'S BRIEF, WILLIAM MCFADON AND SPRIGG, ANDERSON & VANDEVENTER, ATTORNEYS.

The principle is well settled by judicial decision in Illinois, that the *de facto* officer holding an office and receiving the fees and emoluments thereof, is liable to the *de jure* officer who has been excluded from the benefits of the office to which he is entitled, and an action to recover the fees received lies in favor of the *de jure* officer against the *de facto* officer. *Mayfield v. Moore*, 53 Ill. 431; *Farwell v.*

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Adams, 112 Ill. 58; *Waterman v. C. & I. R. R. Co.*, 139 Ill. 669.

This holding of the Supreme Court of Illinois is that of the highest courts, substantially, of all the States in the Union. *McCrary on Elections*, § 332 (ed Ed.); *United States v. Addison*, 6 Wall. (U. S.) 291; *Dolan v. Mayor*, 68 N. Y. 274; *Glasscock v. Lyons*, 20 Ind. 1; *Curry v. Wright*, 9 Lea (Tenn.) 247; *Kessel v. Leiser*, 102 N. Y. 114; *Nichols v. MacLean*, 101 N. Y. 526; *People v. Miller*, 24 Mich. 458; *Hunter v. Chandler*, 45 Mo. 452; *Throop on Pub. Officers*, § 522; *Mechem on Pub. Officers*, § 333; *Dorsey v. Smith*, 28 Cal. 21; *Pettit v. Rousseau*, 15 La. Ann. 239; *Delahanty v. Warner et al.*, 75 Ill. 185.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee presented a claim against the estate of John B. Kreitz, deceased, for money had and received by the deceased in his lifetime for the use of appellee.

The venue was changed from the County Court where the claim was filed, to the Circuit Court. In the latter court the cause came on to be tried, and a jury being waived, the issues were submitted to the court, resulting in a finding for the appellee in the sum of \$7,333, to be allowed as of the seventh class. The appeal of the administratrix brings the record before this court.

The claim was for the salary of the office of treasurer of Adams county, to which the appellee was elected November 6, 1886.

John B. Kreitz, the deceased, was a candidate for the office, and having received a certificate of election from the board of canvassers, took possession of the office, and held it until his death, August 11, 1890.

The appellee contested the election by proceedings properly instituted under the statute, and the case was twice tried in the County Court, and was twice in the Supreme Court. By the judgment of the latter court, upon the final hearing (135 Ill. 591), it was determined that appellee, the contestant, was duly elected to the office. The opinion was

filed after the death of Kreitz, but the judgment was rendered *nunc pro tunc* as of June 11, 1899.

It is argued on behalf of appellant that the appellee has no cause of action.

It is conceded that the rule is otherwise laid down in *Mayfield v. Moore*, 53 Ill. 431, but the position is taken that the constitution of 1870 has so changed the mode of compensating county officers as to make the decision in that case not applicable here.

Prior to the adoption of the present constitution a person holding an office to which fees were incident might retain all the receipts of the office for his own use, and in some counties the emoluments thus became very much larger than was deemed best for the public welfare. In order to limit the amount to be received and retained by the several county officers, it was provided by Sec. 10, Art. 10, of the Constitution that the county board should fix the compensation of all county officers with their necessary clerk hire and other expenses, to be paid in all cases where fees were provided for, out of the fees collected, with certain limitations as to the amount of compensation allowable, the surplus of collected fees to go into the county treasury. It was intended merely to limit the amount of compensation an officer may receive. It is not perceived how this limitation upon the emoluments of an office should modify or abrogate the rule of law announced in *Mayfield v. Moore*, *supra*. The office still has its emoluments, but a limit has been imposed so that in no case shall the officer receive in excess of the amount fixed. It is not always a limitation in fact. It is never so necessarily, for it may happen in any case and does happen in some cases that the fees collected are not sufficient to realize the amount allowed, but the deficit is not made up by the county.

If one not entitled to an office, obtains possession and enjoys its compensation, he has no more reason for retaining what he had no right to take, under the present mode of fixing the compensation, than he had before.

We do not appreciate the argument apparently so much

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relied upon by counsel, drawn from Sec. 12 of Art. 10, of the Constitution. That section provided that all laws fixing fees of State, county and township officers should terminate with the terms of those who might be in office at the first meeting of the General Assembly after the adoption of the constitution, and that the General Assembly should "by general law, uniform in its operation, provide for and regulate the fees of said officers and their successors so as to reduce the same to a reasonable compensation for services actually rendered," and it further provided for the classification of the counties by population and for the regulation of the fees according to class.

This section referred to State and township as well as county officers and had in view the regulation of the fees, to the end that the fee to be paid should bear a proper proportion to the service rendered. It was known that by means of special acts, fees were not the same in all the counties, and that by the same means officers had been authorized to charge fees greatly out of proportion to the service in many instances.

To correct inequality and to prevent excessive charges, this section was devised.

What light it can possibly throw upon the question under consideration we do not perceive.

It is argued by counsel for appellant that appellee can not recover because he was never fully qualified, because he was not commissioned by the governor, and because he did not file bonds as collector for the years 1888-9-90.

In *Farwell v. Adams*, 112 Ill. 57, a similar position was assumed, but was held untenable. The court said the sections of the statute there quoted requiring town officers to take a prescribed oath within a certain time after being notified of election were intended to apply only to such persons as were *prima facie* entitled to office, and quoted approvingly from the opinion of the Supreme Court of Michigan, in *Benoit v. Miller*, 16 Mich. 16, where it was said: "A certificate of election, whether rightfully or wrongfully given by the board of commissioners, confers upon the

person holding it the *prima facie* right to the office until his right is rejected by a voluntary surrender or by a judicial determination against him. The statute requiring the oath of office and bond to be given within a certain time applies only to persons declared elected and to whom the certificate of election has been given."

The court also quoted from *Pearson v. Wilson*, 57 Miss. 848: "Where an election is contested the requirement to qualify within a prescribed time does not apply until the termination of the contest."

We must overrule this objection.

It is further objected that because the appellee never actually obtained possession of the office he can claim nothing.

The litigation was prolonged until the term expired, the final opinion of the Supreme Court being filed in January, 1891, though the judgment was entered *nunc pro tunc* because of the death of the contestee after the cause was submitted to the court.

According to the argument thus made, if the decision had been actually rendered before the term closed so that appellee might have gotten possession though but for a day, his position in a legal point of view would have been better than it is, though the difficulty is due to the delay of the Supreme Court in deciding the case. It is a settled maxim that "an act of the court shall prejudice no man" (*Broom*, 122) and for this reason the judgment was entered *nunc pro tunc*, so that it should be valid notwithstanding the death of a party while the case was under advisement.

Upon similar ground of reason and justice when the final judgment is delayed until the term has expired the successful party should not be deprived of the fruits of his victory.

He can not take possession nor can he have a commission, neither need he perform the useless act of a demand, or of filing an oath or a bond. Assuming for the sake of argument that if the term has not fully run these things are necessary, it is clear that when the term has expired they are not necessary.

In this connection is the argument of appellant that it is a case of *damnum absque injuria*, and an extended discussion of the question as to the right of recovery by an officer *de jure* against an officer *de facto* who has enjoyed the office. The case of *Stuhr v. Curran*, 15 Vroom, is cited and quoted from at some length.

We have examined the principal opinion in that case as well as the dissenting opinion of Ch. J. Beasley. Both opinions are elaborate, but we need not enter upon the field of discussion thus occupied. As already observed the question is settled in this State in favor of the right of recovery by the case of *Mayfield v. Moore*, *supra*, and we may therefore dismiss the point without further notice.

It is also objected that the judgment is too large. This is based upon the proposition advanced by appellant's counsel that the salary of the treasurer was fixed by the board at \$2,000, for the entire term and not at \$2,000 per annum.

It appears that at the meeting of the county board held in September, 1886, the report of the finance committee was presented as follows:

"We, your committee on finance, to whom was referred the matter of fixing salaries of the several county officers of Adams county to be elected November, 1886, whose salaries are to be fixed by the county board, would respectfully report that we have considered the same and would recommend the following:

The salary of the county judge \$2,000. The salary of the county clerk \$3,000 per annum and such sum for clerk hire as the business of the office requires.

The salary of sheriff \$2,000 and the sum of \$2,000 per annum for deputy hire; county treasurer, salary of \$2,000, and \$1,000 for clerk hire. All of which is respectfully submitted. Signed," etc.

On motion the report was adopted as the order of the board.

This action of the board was in pursuance of Sec. 10, Art. 10, of the Constitution, above referred to, which clearly contemplates an allowance per annum.

The report was not carefully drawn.

A salary for such officer was fixed as to some of them it was expressed per annum, as to others there is no limitation whatever for the term of the office. Taken altogether we have in some a salary per annum was provided for each officer. It would be unreasonable to suppose that the board intended the great responsibility that would follow from the construction of the board upon. Evidently the board never so understood it as is apparent from the settlements made with Kreitz on the basis of \$2,000 per annum. Having received the salary per annum under this order, we think Kreitz could not be heard to say that by a nice and technical construction of the order he was entitled to but \$2,000 for the whole term, and that all the residue received was a mere gratuity to which he had no right, which he did not receive by virtue of the office and for which he should not be required to render an account to the *de jure* officer.

It is urged that the copy of the records of the Supreme Court showing the final judgment *nunc pro tunc* was improperly admitted because the different papers therein contained were not properly identified.

This objection seems without force and is not urged with much apparent confidence.

So also, of the suggestion made in this connection that the judgments of the Supreme Court were void, because actually rendered after the death of Kreitz, which is sufficiently disposed of in what we have already said as to the maxim that the delay of the court shall not prejudice the suitor.

It is insisted the court erred in estimating the amount due the claimant. There was evidence before the court as to the reasonable expenses of the office, and the court found that the sum of \$1,000 per year allowed by the board for clerk hire was sufficient.

- Without going into this evidence in detail, we may say we are disposed to agree with the conclusion reached by the court. The sum allowed was no doubt enough and all that was really necessary, if the incumbent gave his personal attention to the duties of the office, as would ordinarily be expected.

The officer should not turn over to subordinates all the duties of the office. The trust is personal to himself and he is required to devote his personal services to the discharge of its functions, using only so much assistance in the matter of details and the like as may be necessary. It would be unreasonable and unjust to permit one not elected to an office, but who holds a certificate of election, and thereby has possession, to show, when called to account by the *de jure* officer, that he wholly neglected to attend to the duties of the position and that he spent the entire salary in paying for the services of clerks and other employes, he doing nothing.

The lawful claimant should not thus be deprived of his just dues when the law finally awards him the office to which he was elected, and from which he was unlawfully excluded by means of a false certificate of election.

The statute of limitations, five years, is invoked as a defense to a part of the claim.

This proceeds upon the view that four months of the time elapsed five years before the claim was filed in the County Court; that during said period of four months the deceased had earned a part of his salary and had actually received it, because he had collected public funds from which he might lawfully retain and appropriate such accrued salary. We think it is unnecessary to determine whether there is evidence upon which to predicate such an hypothesis.

It is a general rule that the time limited by the acts of limitation is to be computed from the time when the right of entry accrued or when the creditor is authorized first to commence a suit. Angell on Lim. 34; Wait's Actions and Defenses, Vol. 7, 231. In the present case the statute did not begin to run until the appellee was in position to maintain his action for the present demand.

Had he brought a suit before the office was adjudged to him, he must have failed. The certificate of election gave Kreitz the *prima facie* right to hold the office, a right which could not be questioned in a collateral proceeding and of which he could be deprived only by means of a direct proceeding to recover the office itself.

As to the action of the court in holding and refusing propositions of law the appellant presents a number of objections. At the instance of appellee the court held propositions No. 1, 2, 3, 6 and 7.

In all of these questions of fact are involved, and for that reason the court might well have declined to treat them as propositions of law. So far as the facts therein stated are concerned we are inclined to agree with the conclusion reached, as will appear from a reading of the propositions in the light of what we have already said. Assuming the court correctly found the facts, we see no error in its application of the law thereto. We think the appellant has no cause of complaint in this respect. The court refused to hold sundry propositions presented by appellant. Of these, eight were in some form or other based upon the view that the appellee could not recover without having qualified or been commissioned, or without having obtained actual possession of the office. We have already considered the questions thus raised and do not care to repeat what has been said in that regard.

The ninth refused proposition presented the point that the claimant could not recover any salary not received by the said Kreitz in his lifetime but which the evidence might show was received by the administratrix.

This relates to the money retained by the administratrix (out of the public funds in the hands of deceased) in her settlement with the county board, for and on account of the salary accrued for the current year up to the time of his death. It can not be said that the administratrix received this money in the sense of collecting it. The deceased had received it himself, and all the administratrix did, was to account for so much as the deceased was not entitled to retain and was bound to pay over. This was the substance and effect of the matter to which the proposition referred, and we see no error in the action of the court herein. The eleventh proposition refused was that the claimant was not entitled to recover interest on the claim or any part thereof. Whether this was true depended upon the facts. The prop-

osition was faulty in assuming that the case was by the proof not within the law allowing interest—but regardless of this feature of the proposition and conceding that the undisputed facts were as assumed—no harm was done by the refusal, because it is apparent the court did not allow interest in computing the amount due upon the claim.

The allowance was evidently for the salary at \$2,000 per year for three years and eight months, the court having determined (as stated in the proposition numbered six, held at the instance of appellee) that \$1,000 per year granted by the county board for clerk hire, was sufficient to cover all necessary expenses of the office. The two remaining propositions marked refused, asserted the bar of the statute of limitations as to the salary accruing more than five years before the claim was filed.

We desire to add nothing to what has already been said on this point.

No other objections of importance are discussed in the brief of appellant.

The whole case considered, we are of opinion that the judgment of the Circuit Court was responsive to the merits and that no substantial error has intervened, wherefore the judgment should be affirmed.

The City of Springfield v. Dora Rosenmeyer.

1. **VARIANCE—Pleadings and Proof.**—Where a declaration alleged that the city permitted a walk to be in an unsafe condition, and divers of the planks and other materials wherewith it was laid, to be and remain broken and unfastened, and the proof was that the planks which were laid for the purpose of a crossing over or across a brick sidewalk had warped or cupped, and the brick had settled so that the plank was from two to six inches higher than the brick walk, *it was held* that the variance was immaterial.

2. **PRACTICE—Variance.**—In making a motion to take a case from a jury, if a party relies upon a variance between the pleadings and the proofs, he should specifically point it out. The question of a variance between the pleadings and the proofs can not be raised for the first time in the Appellate Court.

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8. **NEGLIGENCE—Knowledge of Defects in Sidewalks.**—The mere fact that a person knows of a defect in a sidewalk, though he may not have it in his mind at the time of an accident, is not conclusive against him. It can not be expected that an ordinary person will continually have such a fact in mind and be continually on the alert.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1898, and affirmed. Opinion filed October 28, 1898.

The opinion states the case.

DAVIS McKEOWN, city attorney, for appellants; CONKLING & GROUT, of counsel.

JOHN C. SNIGG, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee brought an action on the case against the appellant to recover damages for personal injuries sustained by reason of the alleged defective condition of a certain sidewalk within the corporate limits of the city. The plea of not guilty was interposed, and the issue was submitted to a jury.

When the plaintiff rested her case the defendant "moved the court to exclude the testimony from the jury and instruct them to find a verdict for the defendant."

The motion was overruled and defendant excepted. The defendant offered no testimony and the court proceeded to instruct the jury on behalf of the plaintiff and on behalf of the defendant as requested by the parties respectively.

The jury found for plaintiff and assessed her damages at \$375.

A motion for new trial was overruled and judgment followed, from which the present appeal is prosecuted.

It is argued first that there is a fatal variance between the allegations and the proofs. The declaration alleged that the city permitted the walk to "be in an unsafe condition and divers of the planks and other materials wherewith the sidewalk was laid, to be and remain broken and unfastened," whereas the proof was that the planks which were laid for

the purpose of a crossing over or across a brick sidewalk had warped or cupped, and the brick had settled so that the plank was higher than the brick walk, the elevation being variously estimated at from two to six inches. The point is that the walk was not broken and unfastened as alleged. The objection thus urged is exceedingly technical, and we are not inclined to agree with the city that there was really a variance, but whether so or not, the point can not be made for the first time in this court. *I. & St. L. R. R. Co. v. Estes*, 96 Ill. 470.

The motion to take the case from the jury did not suggest a variance. If it was the purpose of the defendant to rely upon that objection, it should have been specifically pointed out so that the declaration might have been amended if necessary.

It is assigned as error and so argued in the brief that the third instruction given for plaintiff assumed that the walk was "out of repair and dangerous," and that there was no evidence upon which to submit the hypothesis that the plaintiff exercised such care as a prudent person with her knowledge of the condition of the walk would ordinarily have exercised.

The instruction does not assume that the walk was out of repair and dangerous, but puts it hypothetically.

Whether there was such evidence as to justify the court in submitting the hypothesis of the exercise of ordinary care by the plaintiff, involves the point mainly argued, that the court erred in not taking the case from the jury. This is indeed the real question of importance in the case.

The plaintiff admitted that she had frequently noticed the defect and knew where it was, but at the time she was hurt she was not thinking about it and did not see it. It was after nightfall and she was in company with her daughter. She says she was looking straight in front of her. "We had our eyes down looking where we were going." The daughter says: "We were walking the way we always do, the usual way; well, I suppose we were looking where we were walking, I can't say that particularly. I always look before to see where I am walking."

**Thomas Kent, Administrator of Patrick McCann,
Deceased, v. Delia McCann.**

1. **DIVORCE—*A Vinculo Matrimonii—Dower.***—The divorce, *a vinculo matrimonii*, is the only one authorized by the statute of Illinois. Such a divorce terminated at the common law the right of the wife to dower, because it was essential to dower that the marriage should subsist at the death of the husband.

2. **DOWER—*Rights of a Divorced Wife.***—The rule of the common law has been modified in our State by the enactment of Sec. 14, Chap. 41, R. S., entitled "Dower," providing that if any husband or wife is divorced for the fault or misconduct of the other, except where the marriage is void from the beginning, he or she shall not thereby lose dower; but if such divorce shall be for his or her fault or misconduct, such dower or joinder, and any estate granted by the laws of this State in the real or personal estate of the other, shall be forfeited. The effect of this enactment is to preserve to the wife her right to dower in lands then owned by the husband in case she is granted a divorce for the fault of the husband.

3. **DIVORCE—*Effect of, Upon the Parties.***—After a decree of divorce, the husband has no wife, and the wife has no husband, nor can the survivor be regarded as the widow or widower of the other.

4. **DIVORCE—*Statute Preserves the Wife's Right in the Realty Only.***—Dower does not attach to personal property; it is confined in its operation to real estate or that which savors of realty. This being true, the effect of the statute of divorce is only to preserve to the wife, in case of divorce for the fault of the husband, an interest in real estate which, but for the statute, would have been destroyed by the divorce.

5. **HUSBAND AND WIFE—*Rights of a Divorced Wife in Personal Property.***—A divorced wife does not become the widow upon the death of her divorced husband, and therefore does not become entitled to the rights which the statutes give to a widow. After the divorce, she has no interest in his personal property as his wife, because she is not his wife. To all legal intents as to such property they are as strangers. Each one is free to lawfully contract new marriage relations and become husband or wife to other parties. The statute preserves to the divorced wife her dower in such lands as her husband was seized of during coverture; but aside from this, all other interest in his property terminates with and is destroyed by the divorce, together with the relation of husband and wife.

Memorandum.—Bill by divorced wife for dower in her divorced husband's estate. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this

court at the May term, 1902, and reversed. Opinion filed November 4, 1902.

The opinion states the case.

WOLFE & SAVAGE, attorneys for appellant.

J. L. RAY & BOGGS, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Delia McCann, the appellee, and Patrick McCann, intermarried February 15, 1871.

They were divorced by a decree of the Circuit Court of Champaign County, Illinois, March 15, 1882, on the petition of the wife, for the fault and wrong of the husband, the specific ground being that he had been guilty of acts of extreme and repeated cruelty to the wife. Neither of the parties afterward remarried. Patrick McCann died November 16, 1890, testate. His will disposed of his property, real and personal, without reference to the appellee. The appellant, Thomas Kent, was appointed administrator with the will annexed, of the estate. This was a bill in chancery filed by Delia McCann against the heirs, devisees and legatees of the testator and also against the appellant as administrator.

The prayer of the bill is that dower be assigned the appellee in the lands of which the deceased died seized, and for a decree awarding her one-third of the personal estate after the payment of debts and costs of administration. The Circuit Court awarded the relief prayed for and by this appeal the administrator questions the correctness of so much of the decree as directs the payment to the appellee of one-third of the personalty.

The decree of divorce was *a vinculo matrimonii*. No other divorce is authorized by our statute. *Clark v. Lott*, 11 Ill. 105. At the common law a decree *a vinculo matrimonii* absolutely dissolved all marriage ties and destroyed the relation of husband and wife. (5th Amer. & Eng. Ency. of Law, page 839.)

Such a divorce terminated at the common law the right

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of the wife to dower, because it was essential to dower that the marriage should subsist at the death of the husband. Scribner on Dower, Vol. 2, Chap. 19, Secs. 1, 2 and 13; Cord, Rights of Married Women, Vol. 1, Sec. 488 h.

This rule of the common law has, however, been modified in our State by the enactment of Sec. 14, Chap. 41, R. S., entitled Dower, which is as follows:

“If any husband or wife is divorced for the fault or misconduct of the other, except where the marriage was void from the beginning, he or she shall not thereby lose dower, nor the benefit of any jointure; but if such divorce shall be for his or her fault or misconduct, such dower or jointure, and any estate granted by the laws of this State in the real and personal estate of the other, shall be forfeited.” The effect of this enactment is to preserve to the wife her right to dower in case she is granted a divorce from the husband for his fault.

The appellee was divorced for the fault of her husband and is entitled to the benefit of the change effected by the statute, which is that she did not by the divorce lose her right to dower.

“The case” counsel for appellee aptly say, “presents the simple question, what is dower?”

Their answer to this question, to quote again from their brief, is:

“We claim that dower in this State is finally and conclusively settled by our Supreme Court, to mean the use of one-third of the real estate of her deceased husband during life, and one-third of his personal property, absolutely, after payments of debts. And that this all goes to her under and by virtue of her right of dower in her husband’s estate.

“And we also claim that, she having obtained a divorce from him for his fault, her rights remain just the same in his estate as if they lived together as husband and wife up to the day of his death.”

We have never understood that dower attached to personal property, but that it was confined in its operation to real estate or that which savors of realty.

As to this all authorities are, we think, concurrent. Scribner on Dower, Chap. 10, Secs. 1, 2 and 3; 5th Amer. & Eng. Ency. of Law, pp. 884-885-890 and 891; Davenport v. Farnham, 1 Scam. 314; Cameron on Law of Dower, 67; 1 Washburne on Real Estate, 149.

This being true, the only effect of the statute in question was to preserve to the wife, in case of divorce for the fault of the husband, an interest in real estate which but for the statute would have been destroyed by the divorce.

Counsel for appellee, however, insist that the law in Illinois is that "whatever a surviving wife takes of the estate of the husband, she takes as dower, and not as heir or next of kin."

It is not necessary that we discuss that proposition for the reason that the appellee was not the surviving wife of Patrick McCann, the deceased. After the decree of divorce Patrick McCann had no wife, and the appellee had no husband, nor could the survivor be regarded as the widow or widower of the other. Jordan v. Clark, 81 Ill. 465; Bishop on Marriage and Divorce, Vol. 2, Sec. 1628 and 1629; 5 Amer. and Eng. Ency. of Law, 839, and cases cited, note 1, page 840. She never became his widow, and therefore did not become entitled to rights which the statutes give to a widow. Bishop on Marriage and Divorce, *supra*, and many cited in note 1 to Sec. 1628.

After the divorce she had no interest in his personal property as his wife, because she was not his wife, but they to all legal intents, as to such property, were as strangers; each being free to lawfully contract new marriage relations and become husband or wife to other parties. The statute preserved to her dower in such lands as he was seized of during coverture with her, but aside from this all other interest in his property terminated with and was destroyed by the divorce, together with the relation of husband and wife.

Counsel direct our attention to the case of *In re Taylor's Will*, 55 Ill. 252, which they insist holds that all interest taken by a wife in the husband's estate, whether in the

realty or personalty, is called dower and taken as dower. It ought to be sufficient to say that we are not considering in this case what interest is allowed to a wife out of her husband's estate. The deceased, Patrick McCann, left no wife. The appellee had no husband, and therefore no interest in the estate of a husband. The opening sentence of the opinion of the Supreme Court in the Taylor will case, *supra*, is as follows:

"The only question presented on this record is, under the will of William Taylor, deceased, is his widow entitled to one-third of the personal estate after the payment of debts and costs of administration." Manifestly the widow was so entitled. The court so held, but they did not hold that she took it as dower, but by virtue of the statutes of our State enacted for the purpose of providing, to quote the language of the opinion, "some support for a wife in the event of her surviving her husband," of which the court held the husband could not deprive the wife by other provisions made for her in a will unless the wife be willing to accept such provisions. That the court recognize a distinction between the right of the wife thus secured to her by the statutes and the interest she took by way of dower could not be made more apparent by a labored examination and discussion of the opinion than it is by the following extract from it, viz.:

"It can not be maintained, in view of the statutes, that a person, by making a will in which there shall be no provision for his wife, can thereby deprive her of dower in his land; that will not be pretended. Her *share in the personalty* rests on as solid a basis as the dower, and if he can not deprive her of *one* by the mere act of making a will, neither can he deprive her of the *other*."

We are clearly of the opinion that with the dissolution of the marriage tie appellee lost all interest in the property then owned by him who had been her husband, and in all property he might thereafter acquire, except that by force of the statute she retained a dower interest in such lands as belonged to him during the existence of the marriage.

Not being the widow of the deceased she was not entitled to a decree against the appellant, Kent, as his administrator, for the share in the personal estate of the deceased, which the law vested only in his widow.

The decree must be, and as to the appellant, Kent, administrator, is, reversed.

Vinton E. Howell v. D. B. Fisk & Co.

1. SALES—*Of Chattels—When Fraudulent—Delivery.*—A sale of chattels is, as to a creditor of the vendor, fraudulent in law, unless the property sold is actually delivered to the purchaser, when it is of such a nature and character that an actual delivery and change of possession can be made.

2. SALES—*Change of Possession—Instruction.*—It is error to instruct a jury that a sale of personal property, otherwise valid, is not fraudulent as to existing creditors, though there is no change of possession and the property remains in the custody of the vendor, if the creditor has notice of the sale before a levy is made.

3. SALES—*No Difference Between Fraud in Fact and Fraud in Law.*—There is no difference in effect between a sale made with actual intent to defraud creditors, and one fraudulent by operation of law; notice of either is only notice of an illegal transaction not binding upon a creditor.

4. SALES—*Purchase After Notice and Antecedent Creditors.*—If one purchases after notice, he is but a mere volunteer, but an antecedent creditor is in an entirely different situation.

Memorandum.—Replevin. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed October 28, 1898.

The opinion states the case.

APPELLANT'S BRIEF, KERRICK, LUCAS & SPENCER, ATTORNEYS.

A conveyance of goods and chattels, where the possession is permitted to remain with the vendor, is fraudulent *per se* and void as to creditors and *bona fide* purchasers. Thornton v. Davenport, 1 Scam. 296; Thompson v. Yeck, 21 Ill. 73; Corgan v. Frew, 39 Ill. 38; Frank v. Miner, 50 Ill. 477; Broad-

well v. Howard, 77 Ill. 307; Johnson v. Holloway, 82 Ill. 336; Ticknor v. McClellan, 84 Ill. 474; Allan v. Carr, 85 Ill. 389; Rozier v. Williams, 92 Ill. 188; Huschle v. Morris, 131 Ill. 593; Lowe v. Kean et al., 29 N. E. R. 1036; Pickard v. Hopkins, 17 App. Ct. 570; Wood v. Loomis, 21 App. Ct. 606; Lowe v. Matson, 35 App. Ct. 602.

In such case such sale is fraudulent as to an attaching creditor, although the creditor had notice of the secret sale. Lowe v. Matson, 35 App. Ct. 602; Lowe v. Kean et al., 29 N. E. R. 1036.

Chattel mortgage is void as to third parties, although such third parties have actual notice of the mortgage, and there is no want of good faith on the part of a creditor in levying upon his debtor's property included in such chattel mortgage. McDowell v. Stewart, 83 Ill. 540; Reid v. Eames, 19 Ill. 594.

Possession of personal property is one of the strongest indications of ownership, and in order to make an assignment or transfer of such property effectual as against creditors, there must be an obvious change of possession; one that is observable, or, as it is sometimes expressed, visible; such that the appearance would indicate to an observer that there had been a change. Unless such visible change of possession accompanies the transfer or sale, the same is void *per se* as to creditors. Thompson v. Yeck, 21 Ill. 73; Ticknor v. McClelland, 84 Ill. 474; Wood v. Loomis, 21 App. Ct. 606; Gillett v. Stoddard, 30 App. Ct. 234.

The rule is general in other States, that where there is no actual delivery, the sale is fraudulent *per se* as to creditors of the vendor. Merrill v. Hurlburt, 63 Cal. 494; Edward v. Sonoma Bank, 59 Cal. 148; Taylor v. Richardson, 4 Houst. (Del.) 300; Myer v. Evans, 66 Ia. 179; Foster v. Grigsby, 1 Bush 86; Heilburn v. Brown, 17 B. Monroe 779; Stewart v. Nelson, 79 Mo. 522; Ogerry v. Lowery, 5 Mont. 427; Wilson v. Hill, 17 Nev. 401; Chuma v. Wood, 6 N. J. Law 155; Weeks v. Preston, 53 Vt. 57; Mason v. Bond, 9 Leigh. 181; Bump on Fraudulent Conveyances, page 132, 133-149.

APPELLEE'S BRIEF, EWING & WIGHT, ATTORNEYS.

Where an attaching or judgment creditor has notice of a sale (*bona fide* and for a valuable consideration) it is not fraudulent *per se* that the property remain in the custody of the vendor. *Hanford v. Obrecht*, 49 Ill. 146; *Lowe v. Kean*, 29 N. E. Rep. 1036; *Powers v. Green*, 14 Ill. 386; *Parsons v. Hatch et al.*, 63 N. H. 343; *Zeigler & Co. et al., v. Handrick*, 106 Penn. Rep. 87; *Pope v. Cheney*, 68 Ia. 563.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was replevin brought by the appellees to recover a stock of millinery goods which the appellant, as sheriff of McLean county, by virtue of an attachment writ in favor of Edson Keith & Co., had levied upon and taken into his possession as the property of Mrs. Minnie H. Durham, the defendant in the attachment writ. The goods in question originally belonged to Mrs. Durham and composed the stock in trade of a millinery establishment called the "Bee Hive" conducted by her in the city of Bloomington, Ill. The attachment writ was levied on the 10th day of November, 1892. The appellees claim that they, in good faith, and for a valuable consideration, on the evening of the 7th day of November, 1892, purchased the stock of goods of Mrs. Durham; that possession of the same was delivered to them on the morning of the 8th of November, 1892; that the sale was then complete; that at the time of the levy of the attachment writ they were the owners of the property in dispute and had open and notorious possession thereof. The appellant, who is, as sheriff, the representative of Edson Keith & Co., attaching creditors, upon their behalf denied that Mrs. Durham had sold the goods to the appellees, and insisted that the transaction between them, claimed to be a sale, was fraudulent in law because it was not, as appellants claimed, accompanied by delivery or change of possession, and fraudulent in fact, ~~as~~ being not a real, but a colorable transaction. As this case must again be submitted to a jury, we, for obvious reasons, decline to discuss the evi-

dence relied upon to avoid the alleged sale as being in fact fraudulent. The appellees contend that if the sale was otherwise valid, it is not to be deemed fraudulent in law, even if possession did remain with the vendor. This court is committed to the doctrine that a sale of chattels is, as to a creditor of the vendor, fraudulent in law, unless the property sold is actually delivered to the purchaser, when it is of such a nature and character that an actual delivery and change of possession can be made. *Hewitt v. Griswold*, 43 App. 43. Such is the Illinois rule, and the Illinois authorities supporting this view will be found collected and cited in note 9, page 882, Vol. 8, Amer. and Eng. Ency. of Law.

Counsel for appellees call our attention to *Hanford v. Obrecht*, 49 Ill. 16, *Lowe v. Keen*, 29 N. E. Rept. (Ill. Supreme Court) page 1036, and *Powers v. Green*, 14 Ill. 386, which in their opinion announces the doctrine that a sale, if otherwise valid, is not to be deemed fraudulent merely because there is no change in the possession of the property sold. The facts in the *Hanford v. Obrecht* case were that personal property, the possession of which had been actually taken from a mortgagor by virtue of a chattel mortgage, was, after it had been some days in the possession of the mortgagee, sold at public auction to the highest bidder, who received possession of it from the mortgagee and afterward left it in the possession of the mortgagor. Such possession of the mortgagor was held not to be fraudulent for the manifest reason that he had parted with the possession to the mortgagee, who after some days sold and delivered it to the buyer, whereby the buyer became the legal owner and could legally leave it with the mortgagor or any one else. In *Lowe v. Keene*, *supra*, an assignee of an insolvent debtor had not taken actual possession of the assigned property before executions against the insolvent debtor came to the hands of the sheriff. The holding is, that such an assignee stands in the position of a trustee of the estate for the benefit of the creditors and does not occupy the same position as does a purchaser of personal property under the rule

(which is distinctly recognized) that a sale of chattels unaccompanied by possession is void as to creditors, and Mr. Justice Craig dissented, upon the ground that in his opinion an assignee stood in the same relation to a creditor as an ordinary purchaser. In *Powers v. Green*, *supra*, it is said on page 389 (Underwood's Annotated Reports), "The contract must be made in good faith and upon a valuable consideration and accompanied and followed by possession," and (page 390) it is in the same case said, "The jury found that there was a delivery and that possession was retained by the vendee, but we are called to review the evidence upon which they so found." The court then reviews the evidence and declares it sufficient to support the finding of the jury. These cases and each of them are not only entirely consistent with the Illinois rule as we have announced it, but may each well be regarded as authority in support of the rule. While the appellees contend that the goods were delivered to them and now insist that the proof sufficiently supports them in that contention, yet they contended in the Circuit Court and now contend in this court that the law is that a sale of personal property, if otherwise valid, is not fraudulent as to existing creditors, though there be no change of possession and the property remains in the custody of the vendor, if the creditor has notice of the sale before a levy is made. The Circuit Court accepted this as the correct legal rule, and so in effect instructed the jury. The appellees assert that it is shown by a preponderance of evidence that Edson Keith & Co. had such notice of the sale to the appellee.

We do not think notice of the sale would operate to make effectual as against a creditor, a sale that was deemed by law to be fraudulent and illegal. We had occasion in the case of *Hewitt v. Griswold*, *supra*, to consider that proposition, and arrived at the conclusion that it was immaterial whether the judgment creditor or sheriff had actual knowledge of the sale. There is no difference in effect between a sale made with actual intent to defraud creditors and one fraudulent by operation of law; notice of either is only no-

tice of an illegal transaction, not binding upon a creditor. We see no reason to recede from the position on this point that we assumed on the case cited. Cases supposed to declare that notice is effectual to aid a sale not accompanied by delivery, or where the property remains in the possession of the vendor, will, it is believed, upon careful examination be found only to declare that such notice is effectual as against a subsequent purchaser. If one purchases after notice he is but a mere volunteer, but an antecedent creditor is in an entirely different situation. If in so far we are right, it follows that the Circuit Court erred in instructing the jury that notice to Edson Keith & Co. of the sale was effectual to convert it into a legal transfer, whether possession of the property passed to appellees or not. This error would operate to lead the jury to regard the question of delivery of the property as unimportant, if Edson Keith & Co. had notice of the contract of sale before the levy, and would warrant and directly contribute to a verdict for the appellees without regard to the question of delivery of the goods under the alleged sale. We think that question was a material and important one, and that the appellees ought not to have prevailed unless the jury believed from a preponderance of the evidence that the sale was accompanied by such a delivery of the stock of goods as the law requires to complete a transfer of such property. The appellant stoutly denies that any delivery was made or that any change of possession or control of goods occurred. It appears from the evidence that the goods were not present when the contract of sale was entered into; that no inventory of them was there or at any other time made; that Mrs. Dunham and her clerks and employes remained in possession of the goods after the alleged sale, and prosecuted and conducted the business as they had previously done; that the sign and the name of the place of business was not changed; and other circumstances and facts were proven, bearing on the question of delivery or change of possession of the goods, as to all of which we express no opinion further than to say that it was at least sufficient to raise an issue of fact as to such delivery

or change of possession which clearly demanded the consideration and judgment of the jury as a controverted question of fact between the parties. The appellee ought not have prevailed except upon a finding upon that issue by the jury in their favor. The instructions removed it from consideration as a necessary or material element or point in the case. The error in the instructions was therefore material, and so prejudicial to the appellant that we are constrained to reverse the judgment and remand the case, which is accordingly done.

59	316
154	593
52	316
77	69

Ollie Tucker v. Champaign County Agricultural Board.

1. NEGLIGENCE—*Evidence to be Restricted to the Place of the Accident.*—Upon the trial of an action for personal injuries resulting from a fall through a hole in the floor of an amphitheater, it is not error to restrict the inquiry as to the condition of the amphitheater to that portion of the floor where the appellee was injured.

2. NEGLIGENCE—*A Question for the Jury.*—Where, upon the question of negligence the evidence is conflicting, and its determination depends largely upon the credit and standing of the different witnesses, and the weight and value that ought to have been given to the testimony of each of them, an appellate court should not interfere with the conclusions reached by a jury, unless they are improperly instructed as to the principles of law involved in the case.

3. FAIR ASSOCIATIONS—*Duty in Erecting Structures.*—Associations holding fairs and erecting amphitheaters and other structures for the purpose are liable for injuries to patrons caused by the breaking down of these structures by reason of such defects in construction as proper care would have avoided.

4. FAIR ASSOCIATIONS—*Care to be Used in Erecting Amphitheaters.*—Fair associations, in the erection of amphitheaters and other structures of a like character, are held only to the duty of exercising reasonable care in constructing or repairing them, keeping in view the use to which they are to be devoted, but this degree of care is charged upon the proprietor as a personal duty to be discharged by him. The burden of seeing and knowing that the structures have been constructed with reasonable skill, care and prudence, being cast upon him, he is answerable for independent contractors employed by him, whose failure to use due or ordinary care is to be deemed a failure of the proprietor.

5. FAIR ASSOCIATIONS—*Not an Insurer of its Patrons.*—Fair associa-

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tions are not the insurers of the safety of their patrons, and beyond this, the only warranty is that implied, that persons employed by them to remove or repair an amphitheater are competent to perform such work, and that they did perform it with reasonable or ordinary skill and prudence.

6. FAIR ASSOCIATIONS—*Right of Patrons to Assume That Structures are Reasonably Safe.*—A visitor to a fair has the right to assume the floors of such structures as amphitheaters are sound, free from holes, and safe for the purpose to which they are devoted by the proprietors, and may, in the exercise of ordinary care, enter into and pass about within such structures in all of its parts intended for public use with the assurance that it is not dangerous so to do.

7. INSTRUCTIONS—*Erroneous, Cured by Special Finding.*—Where an instruction is erroneous in tending to mislead the jury, but the jury, by its answers to special interrogatories, shows conclusively that it was not misled, the error is not one which requires a reversal of the judgment.

Memorandum.—Action for personal injuries. Error to the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

J. O. CUNNINGHAM, attorney for plaintiff in error.

GERE & PHILBRICK, attorneys for defendants in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action of trespass on the case. The plaintiff in error, in her declaration, alleged and charged that, on August 27, 1890, she attended the agricultural fair, held by the defendant in error on its fair grounds in Champaign, paying the usual gate fee upon her entrance, and entered the amphitheater prepared by the defendant for the use of visitors, the better to enable them to see the exhibition; that defendant was under obligations to keep said amphitheater in good and safe repair and condition, yet, not regarding its duty in that behalf, carelessly and negligently suffered the same to be in an unsafe condition so that the plaintiff, while exercising ordinary care, fell through a hole in the floor of the same amphitheater and injured her leg.

The People of the State of Illinois v. Chicago & North Branch Railway & Land Company

A plea of not guilty was answered by the defendant "No," and a trial had in the March term, 1901, resulting in a verdict for the defendant in error.

The jury also returned with their general verdict answers to special questions of fact as follows:

1. Was the grand stand or amphitheater of the defendant in reasonably safe condition and repair just before and about the time of the alleged injury? "No."

2. Did the defendant know of such defect, or could it have known of it by the exercise of due diligence before the said injury, long enough to have the same repaired? "No."

3. Did the defendant use the care and diligence to keep the said grand stand or amphitheater in a reasonably safe condition and repair? "Yes."

4. Did the defendant use the and proper care in keeping the amphitheater in proper and suitable repair? "Yes."

5. Did the plaintiff use ordinary care for her own safety at the time she is supposed to have stepped into the hole in the floor of the amphitheater? "Yes."

The jury returned unanswered the following special question:

6. Did the defendant exercise ordinary care in putting the amphitheater into proper and suitable repair before the above accident occurred?

The court overruled a motion entered by the plaintiff in error for a new trial, and entered judgment against her for costs.

This is a writ of error, prosecuted by the plaintiff below, to obtain the reversal of the judgment.

Though formally assigned as for error that the court refused to admit proper evidence offered in behalf of the plaintiff in error, reference made in the brief of counsel thereto, is, in a general way, that the court restricted the inquiry as to the condition of the amphitheater to that portion of the floor where the appellee was injured. This ruling was, we think, correct. It could not have availed to benefit the plaintiff in error to show, if she could have done

so, that the floor was defective at other places than where she was hurt, and to have entered upon an investigation of the amphitheater in its entire extent would have uselessly consumed the time of the court and brought immaterial issues into the case.

So, also, it is formally assigned as error that the court erred in not requiring an answer to the sixth question submitted to the jury, but the brief is silent as to this objection. This alleged error is therefore deemed waived or abandoned. The testimony of the plaintiff was that while upon the amphitheater she stepped through a hole in the floor, with the left limb, to a point above the knee. She claimed, and introduced testimony tending to show that the hole was caused by the giving way of a portion of a rotten plank in the floor of the amphitheater, and that the defendant in error negligently omitted its duty in allowing the hole and decayed plank to remain and be in the floor of the amphitheater while the fair was in progress, and while she and many other persons, upon the tacit invitation of the defendant in error, were upon the amphitheater.

The defendant in error contended and produced evidence tending to support the contention that just before the opening of the fair for that year it appointed a committee, consisting of the president of its board of directors and two other members of its board, to cause the amphitheater to be moved some twenty feet back from its then position near the race or trotting tracks, with directions to set under it a good foundation and put the floor in good, safe condition. That the committee contracted with a competent carpenter and builder to do the work, and that the work was done, and properly and carefully done, before the opening of the fair; that some holes were in the floor, caused in most, if not all instances, by the removal of the structure, but in some cases by reason of decayed or rotten places in the planks in the floor; and that after the removal, and before the fair was opened, the floor was carefully inspected, all holes securely covered with pieces of new plank, and sound inch lumber nailed over planks that seemed to be at all decayed; and that

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the amphitheater floor was in proper and safe condition and ready for the use for which it was intended when thrown open to the people.

Evidence tended to show that a plank of new, sound lumber, three feet long and eight inches wide, and one and one-fourth inches thick, its edges being beveled, was nailed by the carpenters over the identical hole into which the foot and limb of the plaintiff in error passed, and that the hole was found to be thus safely and securely covered in the morning of the day of, and prior to the time of the injury to the plaintiff in error, while other evidence produced likewise by the defendant in error tended to show that soon after her injury the plank which had been nailed over the hole was found broken or split apart lengthwise, and the half of it forced away from its place as a cover for the hole, apparently the result of blows or force applied from beneath the amphitheater. The plaintiff in error contended, and evidence in her behalf tended to show that the hole into which she fell had not been covered, and was not the same hole to which the witnesses for the defendants in error referred. A number of witnesses were produced in behalf of each of the contending parties, and we find that the questions of fact involved in the investigation were stoutly contested and the subject of much conflicting testimony, and that their determination depended largely upon the credit and standing before the jury of the different witnesses, and the weight and value that ought to have been given to the testimony of each of them by the jury. Upon well settled and familiar rules an appellate court should not, and will not interfere with the conclusions reached by a jury upon such evidence, unless it is found that they were improperly instructed as to the rules or principles of law involved in the case. Complaint is made against instructions 3, 4, 5, 8, 10 and 12, given at the request of the defendant in error. These instructions advise the jury that the defendants in error were only required to exercise ordinary care and diligence to secure the safety of the plaintiff in error, and others, its patrons, while attending its fair and upon its amphitheater. Counsel for

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plaintiff in error in their brief insist that the degree of care required to be exercised by the defendant board in behalf, and for the security of persons in and upon its amphitheater is not ordinary care, but "the highest reasonable and practicable skill, care and diligence." As being in support of this view counsel cite *C. & A. R. R. Co. v. Pillsbury*, 123 Ill. 21; *T. W. & W. R. R. Co. v. Grush*, 67 Ill. 263, and *Latham et al. v. Roach*, 72 Ill. 179.

Railroad companies, as public carriers of passengers, are held to the utmost possible care in constructing and in discovering and remedying defects in cars, coaches, engines, etc., intended to be put in rapid motion for the purpose of conveying its passengers, and in its other appliances constructed for the purpose of aiding in the propulsion or management of cars, coaches, engines, etc., that are to be put in motion, because defects in appliances so intended to be moved with great force and velocity would be likely to occasion great danger and loss of life; but the degree of care required of such carriers is not so great when liability because of defects in halls and stairways in and about its depots or other structures intended for public use, but not movable, and the relation of passengers and carriers has not been created, is to be determined, the rule as to such structures being that the carrier is bound simply to the exercise of ordinary care in view of the danger to be apprehended. *Hutchinson on Carriers*, Sec. 521; *Morland v. Railroad Co.*, 141 Mass. 31.

No reason is perceived why a higher degree of care should be required of a fair association with reference to its amphitheater than of a railroad company with reference to its duty in constructing and keeping in repair the halls, stairways and waiting rooms of its stations. The case of *C. & A. R. R. Co. v. Pillsbury*, *supra*, was that of a passenger who was injured while upon a train of railroad cars, and we find nothing in the opinion of the court in the case applicable to the question here presented. The case of *T. W. & W. R. R. Co. v. Grush*, *supra*, was an action to recover damages for injury received by stepping into a hole in the platform at a railroad station, but it did not become necessary nor did the court

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take occasion in the course of the opinion to pass upon or discuss the degree of care that the law demanded of the railroad company. The question which demanded and received the attention of the court in *Latham et al. v. Roach*, 72 Ill. 179, cited by counsel of plaintiff in error as being in support of the position urged by them, was whether the evidence upon which the judgment passed in the Circuit Court showed a cause of action against the Logan County Agricultural Society or against the members of the board of directors as individuals, the degree of care required not being at all involved, nor did the court express any opinion upon that question. In the case of *Currier v. Boston Music Hall*, 135 Mass. 414, it was held that the proprietors of the music hall were bound only to exercise ordinary care and diligence in the discharge of the duties to the patrons of the hall who attended and paid for the privileges of entering and being entertained. Judge Cooley in his works on Torts, says: "When one expressly invites another to come upon his premises for business or other purposes, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises safe. Thus, individuals holding fairs and erecting structures for the purpose, are liable for injuries to patrons caused by the breaking down of these structures through such defect in construction as proper care would have avoided." Cooley on Torts, 2d edition, page 718.

Speaking of the principle to be applied in a case against one who caused a building to be erected for viewing a public exhibition and admitted spectators on the payment of money, it is said in *Thompson on Negligence*, Vol. 1, page 311: "In such a contract there is an implied warranty, not only of due care on the part of himself and his servants, but also of due care on the part of himself and any independent contractor who may have been employed by him to construct the buildings, stands, or other structures which the public are invited to use."

We think the true rule to be gathered from all the authorities is, that the proprietors of such structures as the one in question, or structures intended for like uses, are held only

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to the duty of exercising reasonable care in constructing or repairing them, keeping in view the use to which it is to be devoted, but that this degree of care is charged upon such proprietors as a personal duty to be discharged by them—the burden of seeing and knowing that the building has been constructed with reasonable skill and care and prudence being cast upon them and they held answerable for independent contractors employed by them, whose failure to use due or ordinary care is to be deemed a failure of the proprietors. In the case at bar the acts of the proprietors (the defendants in error) and of the contractor who was engaged by them to move the amphitheater and to repair and put it in condition for use by the patrons of the fair, were brought fully into review by the evidence, and all the facts bearing upon the competency, conduct, care and diligence of both such parties fully investigated by the jury, and the case submitted upon the theory that the default of either bound the proprietors, if such default amounted to a lack of due care.

Moreover, the plaintiff in error is hardly in a position to question the instructions in this respect for the reason that in the Circuit Court the jury were instructed, at her request, that due or ordinary care only was required of the defendant board. In the first instruction given at her instance, the jury was advised that unless the “evidence as to the repairs made by the board shows that the structure was by the repairs rendered reasonably safe,” the defense of “due care” must fail. The second instruction given at her request announces the doctrine that if the floor of the amphitheater was unsafe and remained in that condition for such a length of time that the defendant, in the exercise of reasonable care and prudence, ought to have discovered its defects, then the jury should hold the board liable if the plaintiff in error was injured while using due care and caution, etc. And the fourth instruction given at the request of the plaintiff in error, declares the law to be that if the board maintained a passageway or walk in its amphitheater it was bound to use reasonable care and caution to keep the same reasonably safe for visitors to the fair to walk upon, and that if it appeared from the evidence that the

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board failed to have such walk in reasonably safe repair, etc., liability would attach for any injury. The plaintiff in error asked of the court four instructions which were refused, none of which purport to announce a different doctrine as to the degree of care required of the board, but upon the contrary the second of such refused instructions expressly asks the court to declare that "it was the duty of the board to keep its buildings," etc., in a reasonably safe condition for the prevention of injury to its patrons. The plaintiff in error can not, with propriety, criticise or question the action of the Circuit Court in accepting the theory or rule of law upon which she voluntarily chose to rest her cause. Special complaint is made of the tenth instruction given for the defendant in error, the special ground being that it states that the board "is not an insurer or warrantor of its grand stand." Appellee insists that the board, under all the authorities, is held to warrant to a greater or less extent the condition of the amphitheater. We know of no authority going to the extent of holding the defendant in error to be the insurers of the safety of its patrons; and beyond that the only warranty implied is, that persons employed by them to remove or repair the grand stand were competent to perform such work, and that they did perform it with reasonable or ordinary care, skill and prudence. All this, as we before said, was brought before the jury and their judgment had upon it.

We recognize the force of the objection preferred against the eleventh instruction given at the instance of the defendant in error. This instruction advised the jury that "it was the duty of the plaintiff to use all of her faculties of hearing and seeing to avoid injury, and that if they believed from the evidence that she was watching the people or crowd and was not looking to see where she was walking and stepped into the hole that she might have seen, etc., she could not recover." The question whether the plaintiff in error was in the exercise of due care for her own safety was wholly a question of fact. Nor do we conceive it to be true in matter of fact, law or reason, that a visitor at a fair, instead of employing her time and faculties in admiring and contem-

plating objects, animals and articles brought together there for her entertainment, instruction or amusement, is required to employ her time and her senses of vision and hearing in looking at the floors of the amphitheater to see if it is free from dangerous holes, or in listening that she may hear sounds indicative of possible danger. Such a visitor has the right to assume the floors of such structures as amphitheaters are sound, free from holes, and safe for the purpose to which they are devoted by the proprietors of the fair; and she may, in the exercise of ordinary care, enter into and pass about within such structures in all of its parts intended for public use, with the assurance that it is not dangerous so to do. Whether the appellee as a visitor and sightseer at the fair, employed her powers of vision and her sense of hearing and otherwise conducted herself with such due and reasonable reference to her own safety as ought have been expected when all the circumstances were considered, was a pure question of fact for the determination of the jury, who needed only to be told the degree of care the law required to be exercised. *City of Chicago v. McLean*, 133 Ill. 148. The instruction under consideration was radically wrong in point of law, in that it invaded the province of the jury and assumed to determine for them a pure question of fact, and to declare negligence from facts from which such a conclusion did not conclusively, nor to our mind, even apparently, follow. Had the jury returned only a general verdict, we should have given the possible effect of this instruction serious attention. It was a palpable misdirection, and tended to lead the jury to conclude that the plaintiff in error had failed to use ordinary care for her own safety.

It, however, had no other injurious effect, and, as it appears conclusively from the fifth special finding of fact returned by the jury, that they found and determined that she had exercised ordinary care, it is perfectly clear that the instruction did not mislead the jury to her injury.

There appears no reason requiring a reversal of the judgment. It is therefore affirmed.

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**Dwelling House Insurance Company v. J. C. Shaner and
F. B. Shaner.**

1. **INSURANCE—*Sixty Days' Limitation Suits—Prematurely Brought.***—Under an insurance policy providing that the amount of loss shall be estimated according to the cash value of the property at the time of the loss, and to be paid sixty days after notice and satisfactory proofs shall have been made by the assured, and received at the company's office, a suit brought before the expiration of the sixty days is premature.

2. **INSURANCE—*Conditions of Policy—Mortgaging the Property.***—A policy provided that if the property insured should be incumbered by mortgage, except as stated in writing thereon, or if the buildings are upon leased ground or land, of which the assured has not a perfect title, then the policy should be absolutely void. It was held that a violation of this provision avoided the policy.

3. **PAROL EVIDENCE—*Not Admissible to Vary a Written Contract.***—Evidence of a contract can not exist partly in writing and partly in parol. Whatever may have been said in reference to it between the parties at the time of, or prior to its execution is inadmissible to enlarge, modify or contradict its terms as expressed in the written instrument.

Memorandum.—Suit on an insurance policy. In the Circuit Court of Cumberland County; the Hon. SILAS Z. LANDES, Judge, presiding.

Declaration, pleas: (1) General issue. (2) It is provided in the policy that if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage, or otherwise, or any change take place in the title, use, occupation or possession thereof, whatever, or if the interest of the assured in said property, or any part thereof, become any other than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing upon said policy, then, and in every such case said policy shall be absolutely void. And defendant avers that subsequent to the execution and delivery of said policy, the plaintiffs did incumber the said property therein described, by mortgage, which remained unsatisfied and a subsisting lien upon said premises at the time of said loss, and which said mortgage was not stated in writing upon said policy. (3) It is provided in said policy that all persons having any claim thereunder shall forthwith give written notice of the loss or damage, and within thirty days furnish proof thereof, signed and verified by the claimants, which shall state the time, origin and circumstances of the fire, etc., etc., and until such proofs and certificates should be furnished, the claim should not be due and payable; and defendant avers that no such proof of loss as required by said policy was ever furnished the defendant.

Replication to second plea: At the time of taking the application for

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said insurance, the defendant company was informed by plaintiff that they intended to place a mortgage on the property in the sum of two hundred dollars (\$200), and said policy was issued with that notice, and plaintiffs afterward placed said mortgage on said property, pursuant to such consent given by said defendant company, and plaintiffs aver that after the issuance of said policy, the defendant, by its agent and adjuster, with full knowledge of said mortgage, waived the conditions of said policy relating to the title to the lands upon which said property was situated.

Rejoinder: Defendant was not informed that the plaintiffs intended to place a mortgage upon said property, as in said replication alleged; that said policy was not issued with any such notice, nor was any consent given therefor by defendant, and the defendant did not waive the conditions of said policy relating to the title to said lands on which said insured property was situated. Demurrer to second and third pleas sustained as to the third plea. Defendant elects to stand by said plea, and demurrer overruled to second plea. Plaintiffs reply. Demurrer to replication overruled and defendant pleads. Issues joined, and verdict for the plaintiff, \$432.70. Trial by jury; judgment; defendant appeals. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 24, 1893.

The opinion states the case.

HARBERT & DALEY and W. S. EVERHAET, attorneys for appellant.

L. N. BREWER and F. TOSSEY, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This judgment is upon a policy of insurance against fire.

It must be reversed, because, 1st, the suit was prematurely brought, the sixty days within which the company might make payment not having elapsed; 2d, because the property was mortgaged after the issuance of the policy, and contrary to the express provision thereof.

It is urged that when the application was written the agent of the company was informed that the mortgage would be made, and that he said this would make no difference, and that it would not affect the insurance.

Perhaps the policy should not have contained the clause in question, and for that reason it may be reformed by a bill in equity, upon which point we need express no opinion.

But the clause being there, can not be disregarded because of a verbal understanding previous to or contemporary with the making of the written instrument. It is not the case of a waiver of a condition of a contract, already made, but it is rather an effort to change the terms of a written instrument by proof of a different verbal agreement prior to the writing.

This, upon well settled principles is not admissible, upon which authority need not be cited. As an instance of the application of the rule in cases of this character, reference may be had to *Phoenix Ins. Co. v. Maxon*, 42 App. 164.

The judgment will be reversed and the cause remanded.

Oratio T. Phillips v. William G. Abbott.

1. APPELLATE COURT PRACTICE—*Exception to Instructions*.—If a party desires to question the correctness of the instructions, he must show that he excepted to the same in the court below.

Memorandum.—Case. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

STEVENSON & EWING, attorneys for appellant.

APPELLEE'S BRIEF, KERRICK, LUCAS & SPENCER, ATTORNEYS.

We think a conclusive reason exists why this judgment must be affirmed. It is because appellant failed to except to the ruling of the court, in giving or refusing any instruction, overruling the motion for new trial, or rendering judgment on the verdict. *Pottle v. McWorter*, 13 Ill. 454; *Sedgwick v. Phillips*, 22 Ill. 183; *Low v. Fletcher*, 84 Ill. 45; *Board of Trustees v. Messenheimer*, 89 Ill. 151; *James v. Dixie*, 113 Ill. 183; *Huntington v. Chambers*, 15 Brad. 426.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This action was slander, the charge being that appellant had spoken words imputing to the appellee the crime of larceny. The judgment upon the verdict of a jury was in favor of the appellee in the sum of \$1,750. The defense sought to be made was, that the words were not spoken, or if the words were used as charged, that they were accompanied with an explanation of the transaction to which they referred, which so qualified the slanderous language that the persons present could clearly understand that the offense of larceny was not charged or imputed. It does not appear from the record that the appellant excepted to the action of the court in giving, or refusing to give, or in modifying any instruction or in overruling his motion for a new trial. Therefore, the action of the court in the respects named, is not before us for review, nor can we inquire whether the evidence is sufficient to authorize the verdict. *Board, etc., v. Misenheimer*, 89 Ill. 151; *James v. Dexter*, 113 Ill. 554; *Law v. Fletcher*, 84 Ill. 45.

For like reasons, we can not consider whether the damages allowed are excessive. We have, however, examined the evidence preserved in the bill of exceptions and find that it was established by the testimony of a number of witnesses that the appellant spoke of the appellee the slanderous words charged, or enough of them to answer the demand of the law in such cases, and opposed to such evidence, we find only the unsupported testimony of the appellant. Whether he accompanied the words with an explanation or history of the transaction to which the words referred, was to state the case most favorably for the appellant, a fair question of fact for the determination of the jury.

The complaint that certain instructions given for the plaintiff below authorized the jury to find for the plaintiff upon proof sufficient to make a case for plaintiff, that is, that the appellant spoke the slanderous words charged, thus ignoring the defense that the words were explained and qualified by other words then used and spoken, is not en-

tirely a groundless objection, but if it were a question open to us for decision, we should be strongly inclined to hold that the point was so fully met and cured by the instructions given for appellant, in which the defense in question is fully and fairly stated, and impressed upon the jury in seven different instructions, that, taken as a series, the instruction fully and fairly presented the law in behalf of both the contending parties. The judgment must be and is affirmed.

R. A. Traver v. Samuel Jackson.

1. VERDICTS—*When Not to Be Set Aside*.—Upon the facts in proof, the evidence being conflicting, and no error of law being assigned, the court is not inclined to interfere.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Coles County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

HORACE S. CLARK, attorney for appellant.

ROSE & HENLEY, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment against appellant for \$50.37, for the value of certain broom-corn, deposited with the latter as a warehouseman.

It seems that appellee deposited 204 bales of broom-corn in appellant's warehouse, and paid the storage thereon.

Afterward he sold the corn to one Thos. Lyons, and instructed appellant to deliver it to him. The claim now made is based upon the alleged fact that 198 bales, only, were delivered to Lyons.

Appellant admits now, that he has one bale which was

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not so delivered, but denies that he failed to deliver six bales. Appellee testified that appellant admitted to him that there was the shortage claimed, to wit, six bales. Though this is now denied by appellant, we do not feel warranted in reversing the judgment.

The appellee was somewhat supported by the testimony of the witness, Strains, who helped to remove the corn from the warehouse. He understood that the shortage was not denied either by the appellant, or by Doran, who was acting for him, though the witness could not state the number of bales withdrawn from the warehouse.

No error is assigned upon the ruling of the court as to the admission of evidence, or as to instructions.

The judgment will be affirmed.

B. Stuve v. J. C. McCord.

1. APPELLATE COURT PRACTICE—*Specific Grounds in Motion for New Trial—Waiver.*—It is a well settled rule of practice, that where a party moves the Circuit Court for a new trial, and assigns specific grounds therefor, he will, in the Appellate Court, be confined to the reasons so assigned, and will be deemed to have waived all others.

Memorandum.—*Assumpsit.* Appeal from the Circuit Court of Piatt County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 26, 1893.

The opinion states the case.

LODGE & HICKS, attorneys for appellant.

S. R. REED & W. G. CLOYD, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$346.50, upon an alleged breach of contract to deliver a quantity of corn, sold by defendant to plaintiff.

The argument of appellant is devoted mainly to a discus-

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sion of the evidence, in order to demonstrate that the verdict is without sufficient support.

The proof adduced by the plaintiff sustains the verdict, and is ample for that purpose.

That offered by defendant upon the question as to whether there was a contract as alleged, raises a serious conflict as to this important feature of the case. The rule in this respect, so often stated and applied, need not be repeated here, nor need we quote or analyze the testimony. After reading it and all that counsel say of it, we are very clear that we can not properly reverse the judgment on the ground that it is against the evidence.

There was merely a conflict, which it was the province of the jury to settle.

It is urged in the brief that the court erred in refusing an instruction upon the weight to be given to proof of verbal admissions.

The abstract does not set out any instructions given, refused or modified. To enable this court to determine whether an instruction was properly refused, all those given should be copied in the abstract so that it may be seen whether, in view of the whole series, any harm was done by refusing the one in question, assuming it to be unobjectionable.

The motion for new trial which is set out in full in the abstract makes no point on the refusal of the court to give instructions.

We usually decline to consider the action of the court in regard to instructions where the abstract is faulty as it is here. This because of the failure to comply with the rules of practice in this court.

It is a well settled rule of practice that where a party moves the Circuit Court for a new trial, and assigns specific grounds therefor, he will, in the Appellate Court, be confined to the reasons so assigned, and will be deemed to have waived all others. *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104; *Miller v. Ridgley*, 19 Bradwell, 308; *Clause v. Bullock Printing Co.*, 20 Ill. App. 116.

Parker v. Parker.

We are not impressed with the view that the instruction, if given, would or should have produced a different verdict, and it does not appear, therefore, that the appellant was prejudiced in this matter, even if he were in position to urge the point.

It is argued that if there was a contract of sale the defendant was excused from delivering the corn by reason of the bad condition of the roads and the weather. The alleged contract made no provision for such a defense. It is competent for parties to provide against a contingency of that sort, but when they do not, the law will not relieve them. It is argued also that the jury did not apply the proper measure of damages. There is evidence tending to support the amount allowed, and we are not prepared to say the jury erred in believing that evidence, nor is it argued that they were misled by the instructions as to what was the true measure of damages.

On the whole we are of opinion the judgment should be affirmed.

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Matthew Parker, Admr., use, etc., v. Cornelia Parker.

1. **HUSBAND AND WIFE—*Earnings of the Wife.***—The right to receive and recover moneys due from boarders and lodgers in the family, is in the husband. The wife has no legal demand therefor, though her personal services and labor as housekeeper contributed to the creation of the indebtedness due for such boarding and lodging; but the wife may, if her husband be willing, receive boarders into the family, and contract to board and lodge them in the household for a compensation to be paid to her, and may sue for and recover such compensation.

2. **PAYMENT—*Evidence in Aid of the Presumptions Arising from Lapse of Time—Defendant's Habits.***—Proof that a defendant was in the habit of making prompt and punctual payment of demands against him is only admissible in aid of a presumption of payment arising from lapse of time.

3. **PAYMENT—*Presumptions of—When They Arise.***—A presumption of payment does not arise from mere lapse of time, in the absence of any other proof tending to show payment, when an acknowledgment or ad-

mission of the existence of the debt within the statutory period of limitation is established by uncontradicted testimony, or if it does arise, it is fully rebutted by such proof.

4. **DRUNKENNESS—Expert Testimony.**—Any one may express an opinion as to whether another was intoxicated.

Memorandum.—Error to the Circuit Court of DeWitt County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed.

The opinion states the case.

BRIEF FOR PLAINTIFF IN ERROR, R. A. LEMON AND WM.
MONSON, ATTORNEYS.

The married woman's statute of 1861, did not authorize her to recover even for her personal services; and by an amendment in 1869, she was authorized to contract, sue for, and recover in her own name, compensation for her personal services; but by no statute or previous holding of a court has she ever been authorized to sue for and recover in her own name, the capital, property, or other clearly defined legal rights of her husband. *Flynn v. Gardiner*, 3 Brad. 253. *Cunningham v. Hanney*, 12 Brad. 437; *Stout v. Ellison*, 15 Brad. 222.

BRIEF FOR DEFENDANT IN ERROR, MOORE & WARNER,
ATTORNEYS.

A married woman, although living with her husband, who supplies the provisions for the household, may, with the consent of her husband, board in their family, and furnish care and perform services for a boarder, and sue for and recover compensation therefor in her own name, and no one, other than her husband, can be heard to urge an objection to her so doing. *Bedford v. Bedford*, Adm., 32 App. 460; *Avery*, Adm., v. *Moore*, 34 App. 115; *Casner v. Preston*, 109 Ill. 531.

There can be no presumption of payment of a debt from lapse of time so long as the time of limitation provided by statute for the case has not run against it. *Aultman & Co. v. Connor*, 25 App. 654-7; *Locke v. Caldwell*, 91 Ill. 417;

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Bonnell v. Wilder, 67 Ill. 327; Howard v. Bennett, 72 Ill. 297; Trude, Adm., v. Meyer, 82 Ill. 535.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The defendant in error, who is the wife of Matthew Parker, filed in the Circuit Court of DeWitt County a claim against the estate of Joseph Parker, deceased, for boarding the deceased and for labor and services and personal attention rendered him from March 15, 1886, to December 1, 1889. The case came by appeal to the Circuit Court, where, upon a hearing before a jury, a judgment was rendered for the claimant in the sum of \$675. Certain of the heirs of the deceased, who in their right, as heirs, appeared as parties defendant in the name of the administrator in the Circuit Court, prosecute this writ of error to obtain a reversal of the judgment. It appears from the evidence that while the claimant or defendant in error and her husband were living together as husband and wife, he furnishing the supplies for and defraying all expenses of the household, and she performing the ordinary duties of a wife and housekeeper, the deceased boarded with them and received the care and services of the defendant in error, for which the judgment was rendered. The basis of the claim is the reasonable value of such boarding, care and services. We do not understand that it is seriously contended that the evidence is insufficient to sustain the claim so far as the amount allowed is concerned, but the chief contention is that the presumption of law, where the husband and wife live together and he provides all things necessary for the household and table and bears the expenses of those maintained and lodged therein, and the wife devotes her time and labor to household duties, cooking for and attending upon persons living in the family, is that the husband is entitled to receive the profits derived from boarders, and that sums owed for boarding and lodging are due to him, not to the wife. For that reason, it is urged, this claim can not be supported in the right of the wife. The general rule is, that the right to

receive and recover moneys due, under such circumstances, from boarders, is in the husband, and that the wife has no legal demand therefor, though her personal services and labor as housekeeper contributed to the creation of the indebtedness due for such boarding and lodging. There is, however, in our State at least, a well recognized exception to the rule, and that is, that the wife may, if her husband be willing, receive boarders into the family, and contract to board and lodge them in the household for a compensation to be paid to her, and may sue for and recover such compensation. *Casner v. Preston*, 109 Ill. 531. In the case cited it is said that "whatever may be the duty of the wife in case the husband objects, it is certainly true that no one else can enter such an objection but the husband, and that if it does not appear that he objected, it is to be inferred that he consented thereto." Perhaps this expression should be limited in its application to cases where the defendant is the party owing the indebtedness to the wife. In the case at bar it is satisfactorily shown that the husband was willing, and consented that the deceased, who was his brother, should have a home and be supported at his table and lodged in his house for a compensation to be paid to his wife. The deceased understood that his liability was to her. His declarations and admissions repeated to a number of witnesses, whose testimony is entirely uncontradicted, abundantly established that fact. He repeatedly asserted that he was to pay the wife, not the husband, and his representatives can not now be allowed to urge that payment to her should be refused, because the marital rights of the husband are thereby infringed. This is a personal right to be exercised by the husband alone so far as they are concerned.

The only evidence presented in behalf of the defendant in error was the testimony of two witnesses. One of them testified only to facts tending to show that the husband of the claimant bought and paid for the groceries and provisions used in the family. The other gave no testimony except to state that he was and had for some time been a justice of the peace in the township which was the home

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of the deceased man. This witness was asked if the deceased was ever sued, to his knowledge, to which question an objection was sustained by the court. He was then asked to state, if he knew, what was the habit of the deceased in reference to remaining in debt, his habit of settling obligations. The court sustained an objection to these questions also. These rulings of the court are assigned for error. The objection to the first question was properly sustained. There is authority for admitting proof that a defendant was in the habit of making prompt and punctual payment of demands against him, but such evidence is only admissible in aid of a presumption of payment arising from lapse of time. In this case there is a total absence of any character of proof of payment, or of any fact or circumstance tending to prove payment. The existence of the indebtedness was proven by the acknowledgment and admission of the deceased, made within less than a year before his death, and after all the services sought to be recovered for had been rendered. These acknowledgments and admissions were established by the testimony of eight witnesses, and were wholly uncontradicted and unquestioned. We think no presumption of payment arose in the case to be aided by the proof that was offered. It has been held that a presumption of payment does not arise from mere lapse of time, in the absence of any other proof tending to show payment, when an acknowledgment or admission of the existence of the debt within the statutory period of limitation is established by uncontradicted testimony, or that if it does arise it is fully rebutted by such proof. *Arline v. Miller*, 22 Ga. 330; *Updike v. Lane*, 78 Va. 132; *Lyon v. Adde*, 63 Barb. (N. Y.) 89. It is at all events perfectly clear that the presumption, even if aided by the excluded proof, ought not to have prevailed against the case made by the claimant. In the course of his testimony, one A. J. Brown, when speaking of the condition of the deceased at a certain time, when the witness saw him at the house of the husband, was allowed, over the objection of the plaintiff in error, to say that he thought the deceased was drunk. The objection to

this action of the court is not that the condition of the deceased was immaterial, for the additional attention required to be given to the deceased when in that condition, was an element of the claimant's case; but the objection is that the witness was allowed to state not what he knew but what he thought. We understand that any one may express an opinion as to whether another was in a state of intoxication. *Demick v. Down*, 82 Ill. 570. The statement of the witness was but the expression of such an opinion. The verdict and the judgment of the court is right upon the merits, and there is no substantial error in the record demanding its reversal. It is therefore affirmed.

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**James Y. Campbell, Alfred Sample and Charles Bogardus
v. The People of the State of Illinois, for
use of the County of Ford.**

1. **COUNTIES**—*When the Board May Audit Fees, etc.*—When fees are a proper charge against the county, the county board may audit and allow them and draw orders therefor on the treasurer, and the officer to whom such fees are paid should charge himself with the amount so received in his next report.

2. **OFFICERS**—*Fees.*—There is no distinction between fees earned by an officer, chargeable to the county, and those chargeable to individuals; they must in each instance be paid to the officer, and he must account for the same to the proper authorities.

3. **COUNTIES**—*Duty of Clerk in Drawing and Treasurer in Countersigning Orders.*—It is the duty of the clerk to present the order to the treasurer to be countersigned, before delivering the same to the person for whose benefit it is drawn, and it is the duty of the treasurer to examine the records of the county board, and ascertain that the issuing of the order is warranted thereby, and if it so appears, to countersign the same.

4. **SURETIES**—*Release of, on Official Bond.*—Sureties on the official bond of a county clerk are not released from liability for the malfeasance of the clerk, because of the malfeasance of the treasurer in failing to examine the records of the county board, to ascertain if county orders presented to him by the county clerk to be countersigned have been lawfully issued.

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5. **OFFICERS—Liability of Sureties—For What Acts.**—The object of an officer's official bond is to provide indemnity against his malfeasance as well as his misfeasance or nonfeasance.

6. **OFFICERS—Official Acts Defined.**—An official act is any act done by an officer in his official capacity under color and by virtue of his office.

7. **OFFICIAL BONDS—What is Not a Defense to Suits on.**—The fact that a county board might, by the exercise of due care, have discovered that orders were improperly issued and have refused to approve the report of the treasurer, whereby the loss would have fallen upon the latter and not on the county, is no defense by sureties to a suit on the clerk's official bond. It is not a defense that by the exercise of superior diligence the victim might have prevented the successful operation of the fraud.

8. **COUNTY CLERK—Acts Colorably Official, Binding upon Sureties.**—The act of a county clerk in issuing county orders being colorably official, made possible by virtue of his official position, and being such an act as would have been authorized under proper circumstances, and which would receive no credit except from appearing to be an official act, is within the indemnity afforded by the bond and is binding upon the sureties.

Memorandum.—Debt on the official bond of a county clerk. In the Circuit Court of Ford County; the Hon. THOMAS F. TIPTON, Judge, presiding. Declaration in debt; special breaches assigned.

Stipulation: "For the purposes of this trial, the plea of general performance shall be considered as filed in this cause by the defendants appearing and the similitur shall be considered into such plea. That under the pleadings thus made all proper and competent evidence may be offered by either parties, that might be offered or considered under any proper pleadings that might or could be pleaded in such cause, or any evidence that might or could be offered under any special plea that might properly be pleaded or interposed by the defendants appearing in this cause."

Tried by the court; finding and judgment for the plaintiff. Damages, \$1,316.74. Defendants appeal. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 8, 1893.

The opinion states the case.

APPELLANTS' BRIEF, ALFRED SAMPLE, E. C. GRAY, C. H.

YEOMANS AND J. H. MOFFETT, ATTORNEYS.

Are sureties on a county clerk's bond liable for money paid to the county clerk on the order of the board of supervisors for fees earned by the clerk in performing services for the county—such as making tax books, etc.—when at the time

of such payment, the report of the clerk to the board showed that he had a surplus of collected fees in his hands over and above his salary, etc.?

We deny liability under such a state of facts and assert that such payment by the board was unauthorized. *People v. Toomey*, 25 Ill. App. 46; *People v. Toomey*, 122 Ill. 308; *Marion Co. v. Lear*, 108 Ill. 343; *Crawford Co. v. Lindsey*, 11 Brad. 261.

The county of Ford was the obligee of the county clerk's bonds and the board of supervisors was its agent. *People v. Toomey*, 122 Ill. 317.

Sureties on official bonds are discharged as to acts of the obligee, which create or increase their liability injuriously. *Brandt on Suretyship*, Ed. 1878, Secs. 457, 536; *Murfrees on Official Bonds*, Secs. 755, 788; *People v. Toomey*, 122 Ill. 317.

Sureties are not liable for money which their principal was not entitled to receive. *Brandt on Suretyship*, Ed. 1878, Secs. 451, 483, Ed. 1891, Sec. 528; *People v. Pennock*, 60 N. Y. 521; *Nolly v. Calloway Co.*, 11 Mo. 447; *Mahaska Co. v. Ruan*, 45 Iowa, 328; *Seymour et al. v. Haines*, 104 Ill. 557; *People v. Moore*, 3 Scam. 123.

Money paid to the principal of an official bond by the obligee, under a mistake of law, can not be recovered back from the sureties. *People v. Foster*, 133 Ill. 509.

We desire the distinction to be noted between cases, holding, as in the *Foster* case—where the money was actually paid by the order of the obligee of the bond—and cases where, by order of the obligee of the bond, the principal was allowed to retain public money in excess of his lawful allowance for supposed extra services rendered, as in *Kewaunee Co. v. Kniffer*, 37 Wis. 496.

The court notes the distinction at p. 502.

In this latter case, the officer had lawfully received the money which the securities had obligated themselves he should pay over in excess of his lawful allowance. Hence, the order for the unlawful allowance being void, the original obligation of the sureties was not affected. Money was

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not unlawfully paid to the principal by the obligee out of the public treasury, but the obligee attempted to unlawfully allow him to retain public money which he had lawfully received.

We do not deny the general legal proposition, that sureties on a clerk's bond are liable for fees illegally collected from third persons.

Specifically, this is not the law, if voluntarily paid on a mere demand, with a knowledge that there was nothing due, or that the fees had once been paid. This doctrine, however, has no application to fees earned by the clerk and money unlawfully paid to him by the board.

An illegal demand by the officer for the payment of such fees on the obligee of the bond, does not justify the payment. *People v. Foster*, 133 Ill. 508.

The board of supervisors can not be heard to assert their ignorance of a public law in justification or excuse for such unlawful payment. *People v. Toomey*, 25 App. 46.

The damages must be confined to those arising from the unlawful act of the officer upon whose official bond the suit is brought. *State v. Sloan*, 20 Ohio, 327; *People v. Leaton*, 25 Ill. App. 45; *People v. Leaton*, 121 Ill. 666.

APPELLEE'S BRIEF, COOK & MOFFETT, ATTORNEYS.

Sureties can not plead neglect of board of supervisors. *Stern v. People*, 102 Ill. 540; *People v. Foster*, 133 Ill. 496.

That the board of supervisors passed upon the reports of clerk and treasurer makes no difference. Mistakes can be corrected. *Kenney v. People*, 3 Scam. 357; *Washington Co. v. Parlier*, 5 Gil. 232; *People v. Cooper*, 10 Ill. App. 384; *Brandt on Suretyship*, Sec. 475, *et seq.*; *Ryan v. U. S.*, 19 Wall. 574; *Detroit v. Weber*, 26 Mich. 284; *Crawford Co. v. Lindsey*, 10 Ill. App. 261; *Jennings v. Fayette Co.*, 97 Ill. 419; *Satterfield v. People*, 104 Ill. 448; *Howe v. State*, 53 Miss. 57.

The records and reports were competent evidence. *Morley v. Town of Metamora*, 78 Ill. 394; *Cawley v. People*, 95 Ill. 249.

As to acts *virtute officii* and *colore officii*, Mechem on Public Offices, Sec. 284; Horan v. People, 10 Ill. App. 21.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action of debt on the official bond of Merton Dunlap, as county clerk of Ford county, for the official term, from the first Monday of December, 1882, to the first Monday of December, 1886. The principal on the bond was not served with process and the cause proceeded to hearing against the sureties alone. A jury was waived and a trial had before the court, resulting in a finding and judgment for the plaintiffs, the damages being assessed at \$1,316.74.

The claim of the plaintiffs, upon which the finding was based, was composed of three classes:

1st. Fees collected by Dunlap in Probate and County Court matters and not accounted for by him in his semi-annual reports, \$425.23.

2d. Money paid Dunlap on the authority of the board of supervisors for fees earned by him in making tax books and in other services for the county and for costs taxed in insane pauper cases which he did not account for in his semi-annual reports, \$482.90.

3d. For money alleged to have been paid to Dunlap by the county treasurer on uncountersigned orders, some of which were authorized, some of which were in excess of the amount authorized, and some of which were wholly unauthorized, the money so received by Dunlap being appropriated by him to his own use and never accounted for, \$408.61.

As to the first class appellants make no contention and substantially concede liability therefor.

As to the second, the objection is that at the different times when the items embraced in this class were allowed there was nothing due the clerk for salary, clerk hire or other expenses; that is to say, these allowances were made at various times when there was no unpaid balance due him on his semi-annual settlements and were not included in his reports.

The position as we understand it, is, that the county can

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not properly allow the clerk for his fees earned in services rendered the county or in pauper.insane cases (which the county is liable for) unless at the time of the allowance there is a balance due the clerk as shown by his reports.

We think this position untenable. Whenever the clerk has a claim against the county for services rendered the county, or for fees which it is unconditionally bound for, there is no reason why he may not ask nor why the county may not pay. He should charge himself with the amounts so received in the next semi-annual report, and in this way the accounts may be properly kept.

This view seems to be supported by the case of *The People, etc., v. Foster*, 133 Ill. 496. There the court say that when fees are a proper charge against the county, the board may audit and allow them and draw an order therefor on the treasurer, and that the officer should charge himself with the amount so received in his next report.

Quoting from the opinion, "there can be no distinction between fees earned by the officer chargeable to the county and those chargeable to individuals; they must in each instance be paid to the officer, and he must, in the same manner, account for each thereof."

As to the third class, the position is that because the money received by the clerk and not accounted for, was obtained on orders which were not countersigned by the treasurer and which were not payable to the clerk, the sureties are not liable.

It appears that accounts were presented against the county at various times for stationery furnished the county by various firms, and for liabilities to the Deaf and Dumb Institute. The board would audit the bills and order payment, and the clerk would issue orders professedly in pursuance of the action of the board, but it was found that in some instances the orders were issued in excess of the bills allowed, the record being falsely written to that extent, and in some instances wholly without any authority from the board. It was the treasurer's custom to pay the orders to the clerk without having countersigned them, and to report them as

paid to the county board. Having approved the treasurer's report, the board would destroy the orders. The clerk would remit to the claimants but not always the full amount allowed by the board. With such loose and irregular methods prevailing, it was easy for the clerk to defraud the county as well as its creditors. It is now insisted that the treasurer was at fault in paying orders which he had not previously countersigned, and in paying them to the clerk when he was not the payee named therein. Certainly the treasurer was negligent.

It was the duty of the clerk to present the order to the treasurer to be countersigned, before delivering the same to the person for whose benefit it was drawn, and it was the duty of the treasurer to examine the records of the county board and ascertain that the issuing of the order was warranted thereby, and if it so appeared, to countersign the order.

This neglect of duty by the treasurer greatly facilitated the fraudulent act of the clerk.

But are the sureties to be released from liability for the malfeasance of the clerk because of the malfeasance of the treasurer? Clearly not.

It is urged that the law forbids the payment of the funds of the county in the irregular way here practiced; that the clerk acted without authority in that he violated the law, and that his actions were, therefore, not binding upon his sureties.

But the answer is that the clerk obtained this money by the misuse of his official authority to issue orders, and his wrongful act was also an official act in that it was done under color of his office, without which the fraud could not have been perpetrated.

It will not do to say that the clerk was acting unofficially when he violated the law and his duty. If so there would be no use in requiring an official bond.

The very object of the bond is to provide indemnity against his malfeasance, as well as his misfeasance or his nonfeasance. As was said in *Turner v. Sisson*, 137 Mass. 191,

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“By an official act is not meant a lawful act of the officer in the service of process; if so the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office.”

The fact that the treasurer was negligent, or even culpable, does not lessen the fault of the clerk or render his act any less official. While it may inculcate another, it can not relieve him. *The People v. Treadway*, 17 Mich. 480; *Armington v. The State*, 45 Ind. 10; *Crickett v. The State*, 18 Ohio St. 9; *Mechem on Public Offices*, Sec. 284; *Horan v. The People*, etc., 10 Brad. 21.

It may be urged that the county board might, by the exercise of due care, have discovered that the orders were improperly issued and have refused to approve the report of the treasurer, whereby the loss would have fallen upon the latter and not on the county.

This position can not be held. It is not a defense that by the exercise of superior diligence the victim might have prevented the successful operation of the fraud.

The act of the clerk in issuing the orders being colorably official, made possible by virtue of his official position, and being such an act as would have been authorized under proper circumstances and which would receive no credit except from appearing to be an official act, is within the indemnity afforded by the bond and is binding as such upon the sureties.

Were not this the rule, then in every case where the clerk violates the law, bringing loss to the county, the sureties may plead exemption on the ground that the act is unofficial because unlawful.

Upon the point that payment was made by the treasurer to Dunlap on orders which were not payable to him, it may be noticed that the orders were payable to the person named therein or to bearer, and that the clerk was apparently intrusted by the payees with the matter of receiving the orders and sending to them by bank exchange the proceeds. This seems to have been the usual course of business. Moreover, we believe it is customary for these orders, which of course

have not the qualities of commercial paper, to pass from hand to hand without indorsement.

Banks usually take them from the holder, and the treasurer usually pays them to the holder without indorsement, where the holder is known and where there are no circumstances of suspicion. This is a well known usage and is a matter of business convenience. We are not able to see how this irregularity, if it may be so termed, can avail as a defense to the sureties. We deem it unnecessary to consider the various holdings and rulings of the court as discussed in the briefs. Three propositions of law were held at the instance of the plaintiffs, which were intended to apply respectively to the three classes of claims embraced in the plaintiff's demand. There is no conflict in the proofs, and we are satisfied that the judgment is in accordance with the law. It will be affirmed.

**James H. Hackett, Administrator of the Estate of
Francis W. Baker, Deceased, v. Henry C. Pratt,
and Robert A. Kuechler, Partners as
The Pratt-Kuechler Drug Co.**

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1. **DAMAGES—*Inadequate*.**—At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions for torts were insufficient; at least such was the rule in trespass *vi et armis*, and there is much authority that the rule applied in all actions for torts.

2. **NEW TRIALS—*Inadequate Damages*.**—As a general rule a new trial will not be granted on the ground that the damages are too small in actions for wrongs and injuries, but we think an exception may be drawn from the more modern judicial holdings.

3. **NEW TRIALS—*Grossly Inadequate Damages*—*A More Modern Rule*.**—Where a verdict gives grossly inadequate damages to the plaintiff, a new trial may be granted the plaintiff upon the same principle that like relief is granted to a defendant, when excessive damages are assessed by the jury.

4. **MEASURE OF DAMAGES—*Unliquidated Damages*.**—Where there is no legal measure and the damages are unliquidated the estimation of damages is peculiarly within the province of the jury; so also as to the assessment of vindictive or exemplary damages; but where actual damages

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are shown with such definiteness as to furnish a reasonably certain measure, the court may look into the circumstances proven and grant a new trial, if the amount awarded by the verdict is manifestly inadequate.

5. DRUGGISTS—*Statute Concerning the Sale of Poisons*.—Section 108 of the Criminal Code, which provides for the punishment of any druggist who shall sell and deliver corrosive sublimate or other poisonous substances or liquids, without having the word "poison" printed upon a label attached to the vial in which the poison is contained, does not apply to cases where a druggist is induced to deliver a poisonous liquid to a person by the representations of such person that it was his, and without knowing the character of the same.

Memorandum.—Action to recover damages resulting from death by negligent acts. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1898, and affirmed. Opinion filed October 28, 1898.

The opinion states the case.

OWEN P. THOMPSON and JOHN A. BELLATTI, attorneys for appellant.

I. L. MORRISON and EDWARD P. KIRBY, attorneys for appellee Henry C. Pratt.

J. P. LIPPINCOTT, attorney for appellee Robert Kuechler.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was a case brought by the appellant's administrator for the benefit of two daughters and a nephew, next of kin of the intestate, to recover damages from the appellees, who were druggists, for, as it is alleged, negligently causing the death of Francis W. Baker, appellant's intestate.

The case has been twice tried, each hearing before a jury, the verdict in the first instance being for the appellees, and upon the last hearing the appellees were found guilty by the jury, and the damage of the appellants assessed at one dollar. The appellant's administrator entered a motion for a new trial, the reasons assigned being:

1. The court admitted improper evidence in behalf of the defendants.

2. The court gave improper instruction for the defendants.
3. The verdict is wholly inadequate as to the amount of the damages.
4. The verdict is against the evidence.
5. The verdict is inconsistent.

The motion being overruled, appellant prayed for and obtained this appeal. The errors assigned are the same urged upon the Circuit Court as grounds for a new trial, but the briefs of counsel make no reference to the admission of alleged improper testimony, nor to any instructions alleged to have been erroneously given.

These points are therefore waived. There remains for our consideration only the complaints that the damages allowed are insufficient and the verdict inconsistent and against the evidence. These resolve themselves into one complaint, which is, that the damages are wholly insufficient; for appellant does not, of course, complain that the verdict is otherwise against the evidence or otherwise inconsistent with the evidence.

It seems that, at the common law, new trials were not allowed, upon the ground that the damages awarded by the jury in action for torts were insufficient; at least, such was the rule in trespass *vi et armis*, and there is much authority that the rule applied in all actions for torts. Bacon's Abridg., Ed. 1851, p. 605; 4 Minor Inst. 758.

Conceding that, as a general rule, a new trial will not be granted on the ground that the damages are too small in actions for wrongs and injuries, still we think an exception may be drawn from the more modern judicial holdings. The law is, we think, that where a verdict gives grossly inadequate damages to the plaintiff, a new trial may be granted the plaintiff upon the same principle that like relief is granted to a defendant when excessive damages are assessed by the jury. 1 Sutherland on Damages, 815-16; Amer. and Eng. Ency. of Law, page 893, note 1, and pages 590-1-2. This doctrine is recognized in Carr v. Miner, 42 Ill. 179, and James v. Morey, 44 Ill. 352.

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Where there is no legal measure and the damages are unliquidated, the estimation of damages is peculiarly in the province of the jury; so also as to the assessment of vindictive or exemplary damages; but where actual damages are shown with such definiteness as to furnish a reasonably certain measure, we think the rule is that the court may look into the circumstances proven and grant a new trial, if the amount awarded by the verdict is manifestly inadequate.

The case of *Comstock v. Brosseau*, 65 Ill. 39, and cases in 4 Scam. 33, and p. 497, cited by counsel for appellee as supporting the contrary holding, only decide that a new trial will not be granted to enable a party to recover vindictive damages.

The deceased was a jeweler and earning and receiving wages at the rate of \$18 per week. He provided a home for and supported and maintained his two daughters and contributed to the support of his nephew, a boy of the age of eleven years, and also was educating the nephew. These persons, it is clear, were injured pecuniarily, and suffered substantial financial loss by reason of the death of the deceased, and the evidence furnished a reasonably certain measure of damages therefor. So it might seem manifest that the nominal amount allowed by the verdict was wholly inadequate to compensate the beneficial plaintiffs for the wrong and injury which the jury otherwise indicated was inflicted upon them.

We are disposed to agree with the Appellate Court of the First District in the view of that court as expressed in *Lovett v. City of Chicago*, 35 Ill. App. 570, and *O'Mally v. Railway Co.*, 33 Ill. App. 354, that "the refusal of a new trial will not be disturbed merely on the strength of the inconsistency of the verdict." But if a verdict be that the defendant is guilty of such neglect or default as results in the death of a human being, and yet allows but nominal damages to the beneficial plaintiff, who appears from the evidence to have suffered substantial pecuniary loss by reason of the death of the deceased, we are called upon, it seems to us, to subject the cause to an

investigation to ascertain if the verdict upon the whole case administers justice between the parties.

The default and neglect relied upon in the first and second counts of the declaration is that the appellees were druggists, engaged in the business of compounding and selling drugs, medicines, poisons, etc., and that they committed the sale of such articles to Henry C. Pratt, who, it alleges, was not a registered or an assistant registered pharmacist, and that Francis Baker, the appellant's intestate, who was suffering with an attack of la grippe, "went to their place of business and asked for a vial of whisky and rock candy, and that the defendant unlawfully, carelessly and negligently filled the vial with deadly poison called corrosive sublimate, instead of the mixture called for by the said Baker and paid for by him, and did not affix a label to the wrapper or cover of said vial having thereon the word "poison," or the words "corrosive sublimate," and that Baker, exercising due care, etc., drank of said poison and died from its effects. There is in the record no proof tending to show that Pratt was not a registered or an assistant registered pharmacist, or tending to show that Pratt, or any one else, filled a vial or bottle in which he intended to put, or into which the deceased expected that he would put, whisky and rock candy, with corrosive sublimate or any other mixture for the deceased. No right of recovery could be based upon either of these counts.

The third and only other count charges that the defendants, as partners, were engaged in the business of compounding and selling drugs, medicines, poisons, etc., at retail, in Jacksonville, and that the deceased went into their drug store and asked for and paid for a small vial of whisky and rock candy, and that one of the defendants filled a small vial with poison—corrosive sublimate—and placed around it a wrapper or cover; when the deceased asked for whisky and rock candy one of the defendants delivered to him the said vial of corrosive sublimate, carelessly and negligently, and well knowing that the deceased intended to drink the contents, and that said deceased with due care for his own safety removed the cork from the vial, and drank the

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contents of the vial, and was poisoned and afterward died by reason thereof. It is upon this count alone that any verdict or judgments for the appellant could be supported. The direct averments of this count are that the deceased went into the drug store of the appellants and asked for whisky and rock candy, and that in reponse to his order a vial was filled carelessly and negligently with corrosive sublimate instead of whisky. There is no pretense, as we before said, that any testimony was introduced even tending to prove that the appellee, or any one, by mistake or negligence put corrosive sublimate in a bottle or vial that was intended to be filled with whisky and rock candy.

If inferences in favor of the pleader can be drawn from a pleading and some violence in that respect be indulged in, it might be inferred from this third count that it was intended by it to charge that one of the defendants put corrosive sublimate in a vial and put a wrapper or cover around it, and that another of the defendants handed the vial to the deceased when he asked for a vial of whisky and rock candy. Unless such violent presumption is indulged no evidence will be found in the record to justify any finding whatever under the declaration.

The evidence was, however, allowed to go to the jury without objection to exclude it, and the jury passed upon the case thus presented to them, upon instructions that are not complained of, and consequently our duty is to determine the question presented to us from a consideration of the facts and circumstances proven.

It appears from the evidence that the deceased was a jeweler, and was employed and worked in a jewelry establishment but two doors from appellees' drug store. He was suffering from an attack of la grippe, and was using a remedy—whisky and rock candy—which was procured from appellees. He had been using this remedy for some weeks and found it necessary to procure three or four bottles each week. His habit when he had exhausted his supply, was to bring his empty bottle as he came to his work in the morning, leave it at appellees' drug store to be filled, and call for

it as he was on his way home at the noon hour; or if he did not bring an empty bottle with him he would step into the drug store in the morning and order a bottle to be filled for him, which he would call for at noon. Appellees' custom was to fill the bottle with whisky and rock candy, wrap it in manila wrapping paper, and lay it on the shelf until the deceased should call for it. In the morning of the day of the unfortunate occurrence out of which this cause arose, one of the appellees, Mr. Kuechler, received from a young lady customer a prescription for two drachms of corrosive sublimate in eight ounces of alcohol, which he filled by putting the requisite amounts of the desired liquids in a bottle, upon which was affixed a label bearing the word "poison" printed thereon. The young lady requested him to keep the bottle until she should call for it on her way home, and he wrapped it in manila wrapping paper, of the same color used when wrapping bottles of whisky and rock candy for the deceased and other parties generally, and laid it upon the shelf where packages to be delivered to deceased and other customers were frequently laid. Mr. Kuechler testified he wrote the name and address of the young lady, and the sum to be paid by her on the package, and went to dinner, leaving Mr. Pratt, another of appellees, who had no knowledge of the corrosive sublimate prescription, in charge of the store. It is conceded that the deceased came for a bottle of whisky and rock candy, and received the package of corrosive sublimate. He hastily tore away part of the wrapper, removed the cork, and drank of the contents of the bottle. The appellant contends that admissions and statements of the appellees were proven, to the effect that the deceased had, as was his custom, ordered in the morning a bottle of his remedy, to be prepared and ready for him at noon, and that it was so prepared and wrapped in manila paper, and laid upon the shelf near the package of corrosive sublimate; that when he called, two packages were on the shelf, and Mr. Pratt negligently and carelessly handed him the one containing the corrosive sublimate.

The testimony of the appellees and their employes upon this point, is that the deceased had not been in the drug

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store that day, prior to the time he called at noon, and that he had not ordered a bottle to be filled for him, or left his empty bottle for that purpose, but that he came into the drug store at noon and went toward the shelf where the package containing the corrosive sublimate lay, and pointing toward it, said to Mr. Pratt, "give me my bottle;" that Mr. Pratt did not know what was in the package, but from the words and actions of the deceased, supposed the deceased did know, and seeing but one package there, handed it to him. They deny that two packages were on the shelf. Soon after the deceased had drunk the poison, and while yet in the drug store, his overcoat was brought in from his place of employment, and in one of its pockets an empty bottle was found, upon seeing which the deceased said, "that is what made the trouble," or "caused the mischief," or something to that effect. Appellees argue with much force that the deceased intended to leave that empty bottle in the drug store, to be refilled, thought he had done so, and came into the drug store laboring under such a false impression, and seeing a package wrapped in same kind of paper and of about the size of the one he expected to get, lying upon the same shelf where packages intended for him had at other times been placed, the conclusion that it was for him arose in his mind, and that he asked for it and pointed to it as his, and that Mr. Pratt, relying upon the words and actions of the deceased, gave him the package without knowing what it contained, or having reasons to suspect it was not what the deceased thought it was.

The 103d section of the Criminal Code, which provides for the punishment of any druggist who shall "sell and deliver" corrosive sublimate, or other poisonous substances or liquids, without having the word "poison" printed upon a label attached to the vial in which the poison is contained, was complied with, though we do not think it has application to this case, nor do we think the right of the parties depended at all upon compliance, or non-compliance with the 14th section of the pharmacy act, for its proviso is that its provisions shall not apply to the dispensing of physicians'

prescriptions for poisons. The right of recovery, if any there be upon the facts proven, must rest upon the ground that Mr. Pratt's conduct in handing the package containing the poisonous liquid to the deceased was negligent, and that he, in the exercise of ordinary care as a dealer in deadly drugs, should have removed the wrapper before handing the package to the deceased. Recovery could not be had upon that theory, if the deceased, by a failure to exercise ordinary care, contributed to the mishap. A careful consideration of the evidence has impressed our minds with the conviction that the truth of the matter is, that the deceased on the morning in question intended to leave in the drug store, the empty bottle, afterward found in the pocket of his coat, to be filled with the remedy he was using, but that he did not do so; that he came into the drug store at the noon hour, hurriedly, laboring under and controlled by the impression that his bottle was there, ready for his use, and seeing the package containing the corrosive sublimate, supposed it was for him. His words and actions induced the like belief in the mind of Mr. Pratt, who, at his request, delivered the package to him, as a reasonable and prudent man under all the circumstances would most probably have done. If either of these parties was responsible more than the other for the unfortunate result, it was not the appellees. A finding for the appellees would, in our opinion, have been more in harmony with the weight of the evidence. The verdict is not therefore unjust as to the appellant, and can not be reversed upon the ground alone that it is not consistent. The appellees are content to abide the judgment and end the litigation, and they alone, in our view, have cause of complaint. The judgment is therefore affirmed.

William P. Corbin v. The People of the State of Illinois.

1. **PROSECUTION—*The Term Defined***—A prosecution is defined to be the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment.

2. **COSTS—*Construction of the Statute***.—The effect of Sec. 511, Ch. 38, R. S., entitled "The Criminal Code," is to impose upon a convicted defendant the duty and liability of paying all the costs and fees legally earned and taxable in the case.

3. **COSTS—*Fees of Foreign Witnesses***.—Under Sec. 47, Ch. 53, R. S., entitled "Fees, etc.," the fees of foreign witnesses, whether on behalf of the people or of a defendant, are properly taxable as legal costs of a prosecution.

4. **COSTS IN CRIMINAL PROSECUTION—*Effect of a Taxation***.—When a defendant is convicted, the judgment is that he pay the fees appearing on the fee book, subject, of course, to his right to question the correctness of the bill by motion to retax, or by replevin of the fee bill. A judgment for the costs is incident to a judgment of conviction.

5. **CRIMINAL PROSECUTION—*Position of the County in Relation to the Same***.—Though prosecutions, criminal in character, proceed formally in the name of the people of the State, the county in which the crime is committed is recognized and treated by the provisions of the statute as having a relation to a criminal cause, practically that of a party to it.

6. **COUNTIES—*Payment of Fees in Criminal Cases***.—The duties devolving upon a party to a criminal proceeding are cast by law upon the county. Its privity to a criminal cause is such that the payment of the fees of witnesses by it under the statute, may well be regarded as a payment of such fees in advance by a party, to be recovered against the defendant, if convicted, as in civil actions.

7. **WITNESSES—*Fees of Non-Resident***.—The legislative design was to provide every poor or indigent defendant with means wherewith to defray the expenses of non-resident witnesses who know of facts material to his defense, and to relieve defendants, though amply able to pay such witnesses, from the necessity of doing so unless proven guilty.

8. **COSTS IN CRIMINAL CASES—*Liability of Person Convicted, To Pay Fees of Non-Resident Witnesses***.—It was not the design of the statute to relieve a defendant, when proven guilty of the charge against him, of the burden of paying witnesses' fees, or to make any distinction in that respect between the fees of resident or non-resident witnesses.

Memorandum.—Motion to re-tax costs and to quash fee bill. Error to the Circuit Court of Moultrie County; the Hon. EDMUND P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed.

The opinion states the case.

J. R. & WALTER EDEN, attorneys for plaintiff in error.

J. MEEKER, state's attorney, for the defendant in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

At the November term, 1887, of the Moultrie Circuit Court, an indictment charging the appellant with the crime of murder, was returned by the grand jury of that county. At the April term, 1890, of the same court, a final trial was had upon the indictment, the result being a verdict and judgment that the appellant was guilty of manslaughter.

At the instance of the accused and of the state's attorney certain witnesses, residents of foreign counties, were required to and did attend as witnesses in the case in the Circuit Court of Moultrie County. Each of such witnesses were, upon proper certificates, paid the witness fees allowed by law out of the county treasury of Moultrie county, and such fees were taxed in the bill of fees in the case by the clerk of the court.

When the case was finally disposed of the clerk issued a fee bill and execution against the appellant for the costs in the case, including the fees of such witnesses.

The appellant contends that fees of the witnesses who had been paid by the county, were not legally taxable to him as costs. He sought to quash the fee bill as to such fees but his motion to that effect was overruled, and he prosecutes this appeal to present that question to this court.

The statute provides that "when a person is convicted of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution. 1 Starr & Curtis' Stat., Sec. 511, Chap. 38.

A prosecution is defined to be the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment. Burrill's Law Dict., title "Prosecution;" Schulte v. Keokuk Co., 37 N. W. Rep. 376.

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Such is the meaning of the word prosecution in the statute above quoted.

The effect of this statute is to impose upon a convicted defendant the duty and liability of paying all the costs and fees legally earned and taxable in the case.

The fees of foreign witnesses, whether on behalf of the people or of a defendant are, we think, properly taxable as legal costs of a prosecution. Sec. 47, Chap. 53, R. S., entitled "Fees, etc.," provides that a witness who attends in a criminal case for either the people or the defendant, shall, upon proper certificate, be paid his fees out of the treasury of the county where the crime was committed. The fees involved in the case at bar were so paid.

Counsel for the plaintiff in error insist that a judgment can not be rendered in favor of the witness, because he has been paid; nor in favor of the county, because the county is not a party to the proceeding; and that fees of foreign witnesses in criminal cases stand upon the same footing as fees of jurors; both are to be paid out of the county treasury. The duty of the clerk is to tax the fees of witnesses who make the affidavit required by the statute. This duty is in no wise affected by the fact that the witness may have received his fees from the county, the defendant, or any other person who was willing to and did advance the fees. Such fees are taxed by the clerk to the party in whose behalf the witness attended. When a defendant is convicted the judgment is that he pay the fees thus appearing on the fee book, subject, of course, to his right to question the correctness of the bill by motion to re-tax, or by replevin of the fee bill. A judgment for the costs is incidental to a judgment of conviction. *Moody v. People*, 20 Ill. 315.

It is true, a county is not in form a party to a criminal prosecution, yet so many duties and liabilities are imposed by law upon the county in connection with criminal proceedings in its courts that it can not be regarded as a stranger to such suits.

When a defendant is acquitted, or when convicted, if the costs of the circuit clerk can not be collected from the de-

fendants, the county is required to pay them. (Sec. 15, Chap. 53 R. S.) So in certain cases to pay sheriff's costs (Sec. 19, Chap. 53, page 1130; 1st Vol. S. & C. et al.); in all criminal cases to pay jurors' fees; also expenses of dieting accused persons confined in its jail, and in case of change of venue to pay jurors' fees and other expenses incurred by the county to which the venue is changed, and by the statute under consideration, to advance the fees of witnesses who reside in other counties, which, of course, are wholly lost if the defendant be acquitted.

Though prosecutions, criminal in character, proceed formally in the name of the people of the State, the county in which the crime was committed is recognized and treated by the provisions of the statute we have mentioned and by others not referred to, as having and bearing a relation to a criminal cause—practically that of a party to it. The name of "The People of the State of Illinois," in which a prosecution runs, is not that of either a natural or artificial person or corporation. The duties devolving upon the party prosecuting such a proceeding are cast by law upon the county, which is a body corporate and politic. Its privity to a criminal cause is such that the payment of the fees of witnesses by it under the statute may well, and in our opinion is to be regarded as a payment of such fees in advance by a party, to be recovered against the defendant if convicted, as in civil actions.

True, the statute requires the county to pay like witness fees to the witnesses in behalf of the accused. Two considerations, both beneficial to the accused, moved the enactment of this provision. First, the accused, if acquitted, would not recover from any one such costs by him expended in his own defense. Second, it provided a fund for the use of accused persons who might be financially unable to otherwise secure the attendance of necessary witnesses. The legislative design was to provide every poor or indigent defendant with means wherewith to defray the expenses of non-resident witnesses who knew of facts material to his defense, and to relieve defendants, though amply able to pay such

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witnesses, from the necessity of doing so, unless proven guilty. It was not the design of the statute to relieve a defendant, when proven guilty of the charge against him, of the burden of paying witness fees, or to make any distinction in that respect between the fees of resident or non-resident witnesses. The judgment of the Circuit Court was, in our opinion, correct, and must be affirmed.

Michael Kinney v. The People of the State of Illinois for the use of Road District No. 9, in Morgan County.

1. **OFFICERS—Time in Which to Perform Official Acts.**—Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory, merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer.

2. **OFFICERS—Statutory Directions—When Mandatory.**—Directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which, the rights of those interested are not prejudiced, are not commonly to be regarded as mandatory, and if the act is performed, but not in time, or in the precise mode indicated, it may still be sufficient, if that which is done accomplished the substantial purpose of the statute.

3. **OFFICERS—Treasurer of Commissioners of Highways—Construction of Statute.**—Sec. 60 of the road law of 1889, providing that the treasurer of the commissioners of highways shall, within twenty days after the regular meeting in June, make complaint, under oath, before any justice of the peace, against each person who has not paid his poll tax, is directory, and a prosecution against delinquents is not barred by the lapse of the twenty days mentioned in the statute.

Memorandum.—Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The opinion states the case.

OSCAR A. DELEUW, attorney for appellant.

M. T. LAYMAN, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a prosecution under Par. 186 (Sec. 60), Ch. 121, R. S., for failure to pay the poll tax provided for in that section.

The principal question of fact was whether the appellant was properly on the list of able-bodied men of the district and between the specified ages. This the jury solved against him, and we are not prepared to say, after reading the abstract, that the finding was without sufficient proof, or that it was induced by any improper ruling or instruction.

The principal question of law was, whether the failure to institute the proceedings within twenty days after the regular June meeting was fatal. The rule, as announced in the text books and as approved by the Supreme Court in *Whalin v. The City of Macomb*, 76 Ill. 49, is:

"Where a statute specifies the time within which a public officer is to perform an official act, regarding the rights and duties of others, it will be considered as directory, merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer."

Cooley, in his work on Constitutional Limitations, remarks, p. 78: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested are not prejudiced, are not commonly to be regarded as mandatory, and if the act is performed, but not in time, or in the precise mode indicated, it may still be sufficient, if that which is done accomplished the substantial purpose of the statute."

Another eminent writer says: "And in general it may be laid down as a rule that when a statute directs certain proceedings to be done in a certain way or at a certain time, and the form or the period does not appear essential to the judicial mind, the law will be regarded as directory, and the

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proceeding under it will be held valid, though the command of the statute as to the form and time has not been strictly obeyed, the time and manner not being of the essence of the thing to be done." Potter's Dwaris, p. 222, note 29.

We are inclined to hold that the direction as to time in the statute under consideration is not essential, and was not so designed, but was only intended to induce early and prompt action against delinquents; that it is therefore directory, merely, and that the prosecution was not barred by the lapse of twenty days.

The judgment will be affirmed.

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1. **SALES—Good Will of Trade.**—A covenant which requires a person to abstain from the exercise of his calling for a limited time in a particular place is not in violation of public policy.

2. **DAMAGES—When Liquidated by Stipulation.**—If the parties to an agreement have named a sum as a forfeiture or penalty in case of a breach it will generally be so treated and damages awarded according to the wrong or injury shown by evidence to have been inflicted by the breach; but if the intent of the parties to be gathered from the instrument considered altogether is that, though denominated a forfeiture or a penalty, the sum so named was intended as liquidated damages, it will be so regarded if the damages arising from a breach are uncertain and not capable of being ascertained by any satisfactory or known rule for measuring damages.

3. **GOOD WILL OF TRADE—Covenant for the Sale of—Damages.**—B. sold out his business in D— to W., and in the bill of sale covenanted not to again engage in the business in D— for the space of five years, and in case he did to forfeit and pay to W. \$1,000 as liquidated damages for the breach of the covenant. The covenant was broken and W. recovered \$1,000 for damages. *Held*, proper.

4. **SALES OF GOOD WILL OF TRADE—No Defense that the Vendee has Disposed of His Interest in the Business.**—In an action by the vendee upon a covenant for the sale of the good will of a trade it is no defense to say that since the making of the covenant the vendee has sold out the business and consequently has no interest therein and can not therefore be injured by the breach of such covenant.

Memorandum.—Action of covenant in Circuit Court of Vermilion County; the Hon. EDWARD P. VAIL, Judge, presiding. Trial by the court; finding for plaintiff \$1,000; judgment; appeal by defendant. Heard in this court at the May term, 1898, and affirmed. Opinion filed October 28, 1898.

STATEMENT OF THE CASE.

On the 15th day of July, 1889, the plaintiff in error, who was engaged in business as a photographer in the city of Danville, sold his stock in trade and business to the defendants in error, and agreed that he would not again engage in business as a photographer in Danville for the term of five years. He executed and delivered to said defendants in error the following covenant, viz.:

“Know all men by these presents, that Washington Boyce, of the City of Danville, County of Vermilion, State of Illinois, in consideration of \$1,005 paid by Stephen A. Watson and Alva Watson, the receipt whereof is hereby acknowledged, doth hereby bargain, sell and deliver unto said Watson

(Here follows list of articles sold, which is omitted.)

To have and to hold the said goods and chattels unto the said Stephen A. Watson and Alva Watson, their executors, administrators and assigns, to their own proper use and benefit forever. And he, the said Washington Boyce, of Danville, Vermilion county, Illinois, doth avow himself to be the true and lawful owner of said goods and chattels, in manner as aforesaid, and that he will, and his executors and administrators shall, warrant and defend the said bargained goods and chattels unto the said Stephen A. Watson and Alva Watson, their executors, administrators and assigns, from and against the lawful claims and demands of all persons, and I, the said Washington Boyce, covenant to and with the said Watsons, that I will not enter into the business of photographing, in Danville, Vermilion county, Illinois, within five years from this date, and in case he does he will forfeit and pay said Watsons, parties of the second part, the sum of \$1,000, liquidated damages, for breach of this covenant.

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In witness whereof, I, the said Washington Boyce, of Danville, Ill., have hereunto set my hand and seal this fifteenth day of July, in the year of our Lord, 1889. Possession to be given at once of the gallery.

WASHINGTON BOYCE. [SEAL]"

This was an action in covenant brought to recover the sum of \$1,000 as liquidated damages for a breach of the covenant, the plaintiff in error having, as it is alleged, engaged in business as a photographer in Danville. The plaintiff in error filed six pleas. By the third, fourth, fifth and sixth of these pleas it is alleged as in defense of the action that plaintiff in error and Stephen A. Watson, at the date of the covenant, were rival photographers in Danville, and that he contracted with Stephen to sell him his stock in trade, and agreed not to enter in the business in Danville for five years; that Alva Watson consented to become security upon certain notes which Stephen was to give plaintiff in error for the purchase price of the goods, upon the condition that the bill of sale of the articles sold should be made to him and Stephen, jointly, but that Alva was to have no interest in the goods, when relieved from liability as surety for Stephen; that after the purchase of the stock in trade of plaintiff in error had been completed, Stephen entered into the business of photography, in Danville, at the place formerly occupied by plaintiff in error, but that on the 6th day of February, 1891, said Stephen having paid the notes upon which said Alva was surety, and being the sole owner of the articles mentioned in the instrument sued on, sold and delivered them to one John A. Ross, and covenanted to and with said Ross for a valuable consideration that he would sever his connection with the business of photography in Danville, while said Ross was or might be so engaged in that city; that thereupon said Stephen Watson retired from business as a photographer in Danville, and from thence forward neither he nor said Alva Watson have or had any interest in said goods or in the said business of photography in Danville, and that on the 16th day of February, 1891, the plaintiff in error purchased of said Ross a one-half interest in said

photographic goods and the good will of the business and entered into copartnership with him.

The fifth plea is that the sum of \$1,000 in the covenant mentioned was not intended by the parties thereto as assessed and liquidated damages, but as a penalty to be forfeited upon a breach of the bond.

The sixth plea is that at the time of the alleged breach of the bond neither Stephen nor Alva Watson had any interest in the goods mentioned in covenant, nor other photographic goods in Danville, nor in the business of photography in that city.

The court sustained a demurrer to each of these pleas. The cause was submitted to the court, who refused to admit in evidence, under other pleas, proof that Stephen A. Watson had sold his business to Ross and contracted not to enter into such business in Danville for five years, and also refused to admit proof that Alva Watson was a resident of Indiana, and had no interest in photographic property or affairs in Danville, and also to hear parol evidence that the \$1,000, mentioned in the covenant, was intended as a penalty or forfeiture and not as liquidated damages. Propositions of law applicable to the facts set out in the rejected pleas as constituting defenses to the action were presented to the court and refused. The judgment was for the defendants in error in the sum of \$1,000, to review which this writ of error is prosecuted.

G. W. SALMANS and W. J. CALHOUN, attorney for plaintiff in error.

LAWRENCE & LAWRENCE, attorneys for defendants in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The covenant of these parties only required the plaintiff in error to abstain from the exercise of his calling for a limited time in a particular place.

The restriction was not violative of public policy but was valid.

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This principle is so familiar and well recognized that it needs no citation of authorities in its support.

Another principle applicable to this contention is declared in *Gobble v. Linder*, 76 Ill. 157, to be equally well settled, and that is if the parties to an agreement have named in the instruments a sum as a forfeiture or penalty in case of a breach it will generally be so treated, and damages awarded according to the wrong or injury shown by evidence to have been inflicted by the breach; but that if the intent of the parties to be gathered from the instrument considered altogether is that, though denominated a forfeit or a penalty, the sum so named was intended as liquidated damages, it will be so regarded if the damages arising from a breach are uncertain and not capable of being ascertained by any satisfactory or known rule for measuring damages.

In the case at bar we are not left to the necessity of gathering or inferring the intent of the parties relative to the sum named from the whole instrument, because the express words of the covenant are that the plaintiff in error in case of a breach, "will forfeit and pay said Watsons the sum of one thousand dollars liquidated damages." Moreover, it is manifest that the damages which would result from a breach of a covenant not to engage in the business of photography are uncertain and difficult of ascertainment as an issue or question of fact, and as it appears from the face of the covenant that the parties agreed upon a sum certain as liquidated damages in case of a breach, and there being no reason apparent why such sum should be deemed disproportionate to the real or possible damages thus agreed and fixed, we think the ruling of the Circuit Court that the amount of the recovery was controlled and fixed by the sum stipulated, was correct. *Gobble v. Linder*, *supra*; *Perrie v. Webber*, 47 Illinois, 41; 13th Am. & Eng. Ency. of Law, 854-56 and 867.

Counsel for plaintiff in error argue that as the pleas aver that the plaintiff in error retired from business after selling out to the Watsons, and remained out of the business while Stephen Watson engaged in it in Danville, and only exercise his skill in photography after the Watsons had retired from such business in Danville, under a contract on the part

of Stephen Watson not to engage in it again in that city for five years, that it undisputably appeared from the pleas that no actual damage accrued to the defendants in error or either of them, and as in the absence of actual injury and damages there can be no recovery of liquidated damages, the pleas presented a complete defense and the court erred in holding to the contrary. The contract and covenant of the plaintiff in error that he would not engage in business as a photographer in Danville within five years from its date was a valid and binding obligation, and as such, was enforceable in the courts. It can not be said that defendants in error can not possibly be interested in the performance of the contract, nor be damaged by its breach, simply because neither of them are engaged in, nor interested in, the business of photography in Danville. For aught that appears in the pleas, they, or one of them, may be engaged or interested in such business in the immediate vicinity of that city and may suffer because of the exercise by the plaintiff of his skill, experience and reputation as a photographer in Danville, to an extent but little, if any, less than if the parties were rivals in the business in the same city or village. The exercise of his calling by the plaintiff in error in Danville, may be prejudicial to the defendant in other ways which can not and need not be the subject-matter of conjecture. He legally bound himself to defendant in error for a consideration, not to so exercise his calling in that city for a limited period of time, and agreed that if he violated his covenant, that the damages to be paid by him to them should not be left to the courts to determine as a matter of fact, but should be estimated and fixed at \$1,000.

He received and enjoyed, or is yet in the enjoyment of the considerations paid for his agreement to so abstain from his calling, and, as he has refused to abide by his covenant, it can only be held that he is liable for its breach.

The obligees are entitled to the full benefit of the covenant, and the obligor does not fully answer its violations by saying that the obligees are no longer his rivals in Danville. The pleas were properly held insufficient.

The judgment must be and is affirmed.

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1. **INDICTMENT—Statutory Offenses.**—An indictment for a mere statutory offense must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself.

2. **STATUTORY CRIMES—Requisites of the Indictment.**—When the language of a statute creating a new offense does not describe the act or acts constituting such offense, the pleader is bound to set them forth specifically.

3. **CRIMINAL LAW—Statutory Offenses—Frame of the Indictment.**—On the general principles of common law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is; but in no other case is it sufficient to follow the words of the statute.

4. **ELECTION FRAUDS—Insufficient Indictment.**—Under Sec. 82, Ch. 46, R. S., providing that "Whoever at an election fraudulently or deceitfully changes a ballot of an elector, with intent to deprive such elector of voting for such person as he intended, shall, on conviction thereof, be fined in a sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court," an indictment charging that the defendant unlawfully, willfully, fraudulently and deceitfully did change a certain ballot of one J. T., who was then and there an elector, etc., with intent to deprive the said J. T. as such elector of voting for one D. C. D. for the office of supervisor of said town of Mt. Z. as he, the said J. T., then and there intended, contrary to the form of the statute, etc., is not sufficient.

Memorandum.—Indictment for changing ballot. Error to the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and reversed. Opinion filed October 28, 1893.

The opinion states the case.

**BRIEF FOR PLAINTIFF IN ERROR, BUCKINGHAM & SCHROLL
AND W. C. JOHNS, ATTORNEYS.**

"The special matter of the whole offense should be set forth in the indictment with such certainty that the offense may judicially appear to the court. Whart. Crim. Pl. and Prac., Sec. 151, *et seq.*, Sec. 221; 1 Bish. Crim. Prac., Sec.

623, *et seq.*; 1 Archb. Crim. Prac. and Plead., p. 265, *et seq.*; McNair v. The People, 89 Ill. 441; Johnson v. People, 113 Ill. 102; Pearce v. The State, 60 Am. Dec. 135; 23 Am. Law Rev. 540; Whitesides v. People, Beecher's Breese, 21; Thompson v. People, 96 Ill. 158; Williams v. The People, 101 Ill. 382; Hungate v. People, 7 Brad. 101; Baker v. The People, 105 Ill. 452; Ferkel v. People, 16 Brad. 310; Brennan v. The People, 110 Ill. 536.

I. R. MILLS, state's attorney, for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was convicted of violating the election law.

The indictment contained eighteen counts. In the first it was averred that the accused, at an election being held on the 7th of April, 1891, "in the town of Mount Zion, in the county of Macon, for the election of town officers for said town, unlawfully, willfully and deceitfully did change a certain ballot of one John Tohill, who was then and there an elector of said town, in the county aforesaid, with intent then and there unlawfully to deprive the said John Tohill as such elector, of voting for one David C. Davidson for the office of supervisor of said town of Mount Zion, as he, the said John Tohill, then and there intended, contrary to the form of the statute," etc.

The other counts (except the 8th, which was quashed), were like the first, the name of a different voter being set out in each one.

A motion to quash was overruled as to all the counts, save the eighth.

A trial by jury resulted in a verdict of guilty on all the counts except the 6th, 8th, and 17th.

A motion for new trial was interposed, whereupon the prosecution asked and obtained leave to enter a *nolle pros.* as to the 2d, 11th, 13th and 16th counts. The motion for new trial was overruled, and judgment was entered imposing a fine of \$50, and imprisonment in the county jail for

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ten days upon each of the counts remaining, eleven in number.

The trial was protracted and the record is voluminous. Many errors have been assigned. The case has been elaborately and ably presented on both sides in this court by oral as well as printed arguments.

In the view we are compelled to take, it will be unnecessary to notice all or even the major part of the points discussed.

The first question to be considered is as to the sufficiency of the indictment.

It is insisted the counts are all defective for various reasons, and especially because they fail to aver the manner and means by which the alleged change in the ballots was made. To this objection it is answered that the indictment is for a statutory offense, and that the charge is stated "in the terms and language of the statute," and "so plainly that the nature of the offense may be easily understood by the jury—relying upon Sec. 6, Div. 11 of the Criminal Code. This provision is a very familiar one. It is frequently cited at the bar and has often been discussed by our Supreme Court. It would be unnecessary labor to notice and analyze the various cases so appearing in the reports, but we think a very clear, concise and apt statement is to be found in *Johnson v. The People*, 113 Ill. 102, where the court say: "No principle of criminal pleading is better settled than that an indictment for a mere statutory offense must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself. That it shall so appear, the pleader must charge the offense in the language of the statute or specifically set forth the acts constituting the same. It sometimes happens, however, that the language of a statute creating a new offense, does not describe the act or acts constituting such offense; in that case the pleader is bound to set them forth specifically. This elementary rule is laid down in all the standard works on criminal law and is recognized by this court."

Wharton on Criminal Pleading and Practice, Sec. 220, re-

marks: "On the general principles of common law pleading it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far *individuates* the offense, that the offender has proper notice from the mere adoption of the statutory terms what the offense he is to be tried for really is, but in no other case is it sufficient to follow the words of the statute. It is no more allowable under a statutory charge to put the defendant on trial without a specification of the offense, than it would be under a common law charge." And in the succeeding section:

"A statute on creating a new offense describes it by its popular name. It is made indictable, for instance, to obtain goods by falsely personating another.

But no one would maintain that it is enough to charge the defendant with 'falsely personating another.' So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An act of Congress makes it indictable to 'make a revolt,' but under this act it has been held necessary to specify what the revolt is. 'Fraud' in elections in a Pennsylvania statute is made indictable; but the indictment must state what the fraud is.

It is not enough to say that the defendant 'attempted' an offense, though this is all the statute says; the particulars of the attempt must be given. 'Not a qualified voter' in a statute must be expanded in the indictment by showing in what the disqualification consists."

Bishop on Criminal Procedure, Vol. 1, Sec. 629, remarks: "An offense not defined, but created by some word of known meaning, is bounded by the term itself; yet an indictment employing the term alone, would be often insufficient. It must set out the elements of offense; thus a statute having made it an offense to maliciously and cruelly maim, beat or torture a horse, ox, or other cattle, a count for torture, the court deemed, must show the means and their effect. In all acts of this character * * * the means of producing the torture must be averred, and the

court must see that such means have the inevitable and natural tendency to produce the effect in which the criminal charge consists."

The statute upon which this indictment is predicated describes the offense thus: "fraudulently or deceitfully changes a ballot of an elector, with intent to deprive such elector of voting for such person as he intended." Cl. 3, Par. 84, Ch. 48, R. 8.

Here an offense is created, and in defining it, general terms are necessarily employed. The act must be fraudulent or deceitful; there must be a change in or of a ballot, and that must be done with the intent to deprive the elector of voting for such person as he intended. The change here denounced must of course be a substantial one, and in some degree calculated to effect the illegal object. It is suggested there are various ways by which it might be accomplished, as by substituting a wholly different ballot, or by some alteration of the ballot voted, as by erasing or cutting out the name of a candidate or by placing a paster with another name over that of the candidate, or by writing in the name of another candidate, so that the ballot would be for two candidates for the same office, or by changing the name of the office, or by placing some mark or designation upon the ballot that might render it insensible and void. It is also suggested by the prosecution and it was so held by the trial court, that the change may be made, not only before the ballot is tendered to the election judges, but after it has been by them received.

The statute does not, in the language of Wharton, so far individuate the offense, as that from the adoption of the statutory terms, the offender would know what particular act he was charged with. Manifestly, it would have been impracticable to set out all the various ways by which a ballot might be fraudulently or deceitfully changed, and so the offense is stated in general terms. It thus covers all the methods by which the offense might be committed, and in alleging the offense in an indictment, the acts constituting the same must be specifically set forth.

In this case nearly a score of different voters have been imposed upon, as averred, but it is not to be known, from the language of the pleading, in what way the imposition was practiced in any of the various instances alleged.

We find it argued in the brief for the prosecution that if the accused was in fact guilty, then he was well aware of the nature of the charge he would be required to meet. It may be true that in all cases where a defendant is guilty of a violation of the law he has no need to be informed of the exact nature of the case to be made by the prosecution, and that in such instances the indictment is an unnecessary formality.

But the law proceeds upon the theory that the defendant has the right to know by the terms of the indictment precisely what charge he has to meet.

This is a constitutional right which the courts can not ignore if they would.

The defendant is not presumed to be guilty and therefore to have no need of this protection. He is presumed to be innocent until the contrary appears.

If he is in fact not guilty, it is a right of inestimable value to have the charge specifically made, to the end that he may meet and overcome the *prima facie* case that may result from false or mistaken testimony or from a combination of circumstances which, unexplained, may point toward his guilt.

He not only will wish to avoid a conviction but he will desire to vindicate his innocence. The law is as completely upheld in the acquittal of the innocent as in the conviction of the guilty. Even if the defendant be guilty, he has the legal right to hold the prosecution to the proof of guilt as alleged. He can not be convicted of a crime substantially different from that alleged, and he has the right to plead the record in bar of another prosecution for the same offense.

Passing by the other objections urged to the indictment, we are very clear that it is fatally defective in not averring the mode and means of the alleged change.

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It is not necessary to further consider the case as the conclusion we have reached on this point must reverse the judgment and end the prosecution under the present indictment but we have examined the evidence as it appears in the abstract, and feel compelled to say that there is the gravest reason to doubt the justice of the conviction. The evidence discloses that the defendant was acting as one of the judges of the election, and that in such capacity he received the ballots in question, except perhaps two, which were voted while he was away at supper. He was also a candidate for supervisor, and was guilty of a palpable impropriety in acting as a judge of the election.

The theory of the prosecution is that the defendant changed these ballots by opening the same and making a pencil mark across the name of Davidson, between the time of receiving them, and the time of placing them in the ballot box. The marks that appear on the various ballots, and that constitute the change complained of, were made hurriedly and stealthily, or perhaps were made as they now appear, for the purpose of deceiving the voter. Certainly they are not such marks as a voter ordinarily makes for the purpose of scratching a name on a ballot which he intends to vote. Clearly, these marks were made for a fraudulent purpose, but by whom they were made is not proved. There is absolutely no evidence that defendant made them. He was sitting in front of the window through which the ballots were presented, and in full view of all persons who were on the outside. He was also in full view of four other persons, Reber, Smith, Hutchinson and Whitehouse, who were acting as election officers. These men were witnesses on the trial, the three first named being called for the prosecution and the last for the defense.

Not one of them, nor any other, saw the defendant do anything with any of these ballots save to mark the number on the back and deposit them in the ballot box. From their testimony, and from the positions occupied by the various parties about the table, it seems hardly possible that he could have made the marks in question without being

detected. The three witnesses, Reber, Smith and Hutchinson, testify that they noticed marks on ballots very much like those now appearing when the ballots were being arranged or assorted in piles after the polls were closed and before the counting began. How many they saw is not certain.

Smith thinks he saw two or three. Reber three or four. Hutchinson three. Upon this testimony it was insisted that the nine or ten, which they think they saw, and an equal number which they did not then notice, were all marked by defendant.

It is urged that when the tickets were counted these marks were on them, and Wallace, the prohibition candidate for supervisor, testifies that he noticed them on the most of them as they were read off by the defendant, but the marks may have been made by others, who had as much chance as the defendant, after they were taken out of the box. Indeed, there was an excellent opportunity for it when the tickets were being sorted over and placed in piles before counting.

It is a quite remarkable circumstance that all of the witnesses who were called to prove that they voted these tickets, and that there were no such marks on them when handed to the defendant, did not see him place any of them in the ballot box. They either turned away at the instant of parting with their ballots, or from some cause or other, failed to see what, if anything, the defendant did to or with them. This is unusual and at variance with common experience and observation.

John Tohill admitted, however, on cross-examination, that perhaps he did see his ballot numbered and put in the box. It appears, also, that this witness, Tohill, had testified in the case of the contested election between defendant and Davidson some months before, that he saw the defendant place the number on the ballot and then place the ballot in the box without having opened it, and under such detailed circumstances as that it seems highly improbable that the defendant could have then made the mark now appearing

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on that ballot. This testimony was in the form of a deposition, and there can be no doubt as to what the witness then stated. Considering his age and other circumstances now admitted by him as to his recollection and the possibility of mistake, it is reasonable to place the greater reliance on what he formerly testified on this point.

Chauncey Turpin, whose ballot is the subject of the 18th count, when he was before the grand jury, testified that he saw the defendant number his ticket and place it in the box without opening or marking it on the inside. The written notes of what he so testified before the grand jury, were produced in support of the evidence of two members of that body, and while he now states that he turned his head away for a moment while the defendant was numbering his ballot, yet it is hard to believe that the defendant would have dared to change the ballot by a mark on the inside, or indeed, that he could have done it without detection, while the voter was standing at the window looking at him, except, possibly, for a space of time too short for computation.

As to the ballots of Wm. Maden and Wm. Brewer, there is great conflict in the evidence as to whether they were received by the defendant or by Whitehouse, who received ballots a short time while the defendant went to supper.

By agreement of parties, the original ballots have been presented for our inspection.

We are inclined to think the numbers on the back of these two ballots, Nos. 304 and 305, are so much like the figures made by the defendant on other ballots, which he admits, that the jury may have been justified in finding that he received and numbered these ballots. Finding this issue against the defendant was greatly to his prejudice, in view of the contest made on the point, and no doubt this was a powerful adjunct of the prosecution.

We have, however, no doubt that the numbers on the back of these ballots, and the pencil marks on the inside, over the name of Davidson, were not made by the same hand or by the same pencil. The difference in both these respects is apparent.

It is argued on behalf of the plaintiff in error, and is conceded in effect in the brief of counsel for the prosecution, that if the plaintiff in error was not guilty as to all, he was probably not guilty as to any of these ballots. While we are ready to give all due weight to the verdict of a jury where there is evidence of a direct nature, which, if unopposed, would support the finding, yet in a case like this, where there is no direct proof of guilt, and where the charge rests upon circumstantial evidence, we are inclined to scrutinize very closely, and even critically, the grounds upon which the verdict is based.

Circumstantial proof may be very satisfactory—and it may be very deceptive. It is in all our experience that it is often unreliable, and this for the plain reason that the weight due to particular circumstances is easily magnified and overestimated.

When a crime, unusual in character and affecting the public in an especial way, has been committed, a conviction may be had sometimes without sufficient proof.

It was so here. The accused may have been guilty, but the jury should not have so found on the evidence, as we read it in this record.

We omit all reference to the other errors assigned and argued at length *pro et con* in the briefs.

Because we hold the indictment defective, the judgment must be reversed, and the plaintiff in error will be discharged.

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J. E. Moffett v. Thomas E. Sheehy.

1. EXEMPTIONS—*Requisites of a Schedule.*—The schedule under Ch. 52, R. S., entitled "Exemptions," should list separately each article of a distinct kind, or of a distinct quality, grade, or description of the same kind, in order to enable appraisers the more readily to fix the value of each article contained in it.

2. APPRAISEMENT—*Insufficiency of Waiver.*—When appraisers have been appointed to make an appraisement under Ch. 52, R. S., entitled

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"Exemptions," and the same is made by them and accepted by the debtor, he waives all imperfections in it and can not be heard to object to it afterward.

3. EXEMPTIONS—*Schedule—Appraisalment and Selection.*—The officer having the execution can not make a selection for the debtor, nor can he change one made by the debtor.

4. EXEMPTIONS—*Imperfect Appraisalment—Debtor Selection.*—If a schedule and appraisalment, as made by the appraisers, does not enable the debtor to select specific articles at appraised values, he should seek to have them corrected.

5. EXEMPTIONS—*Mortgaged Property.*—A defendant is the absolute owner of property as against the execution creditor and the officer having the execution, and as against mortgagees also, subject only to the lien of their mortgages, which they were not bound and might never be disposed to enforce. The debtor's interest, notwithstanding the mortgage, is subject to execution.

6. EXEMPTIONS—*Construction of the Statute.*—All the proceedings under the statute of exemptions show that it contemplates only specific, tangible articles of property, which can be taken, delivered, returned, replevied, etc. An equity of redemption, a mere lien or equitable claim, without possession, is susceptible of neither.

7. EXEMPTIONS—*Duty of Appraisers.*—Appraisers are authorized and required only to fix the fair value of what they can see and at what they can ascertain by inspection and handling. They have no authority to consider and adjust equities between an execution debtor and third persons, or to ascertain whether a mortgage was given for money borrowed, for future advances, or for indemnity to the mortgagee against a liability which might or might not arise.

8. EXEMPTIONS—*Debtor's Right to Property Defined.*—If the execution debtor takes it as exempt, he must take it at the value fixed upon it by the appraisers, unaffected by other liens upon it. If he has given a mortgage upon it, the presumption is that he has had and enjoyed so much of its value, and there is no hardship in denying to him the claim to have it again. In this proceeding he is not authorized to set up a claim for the mortgagee that is not prejudiced by the execution.

Memorandum.—Replevin. Error to the Circuit Court of DeWitt County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

MOORE & WARNER, attorneys for plaintiff in error.

R. A. LEMON and O. E. HARRIS, attorneys for defendant in error.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Replevin commenced before a justice of the peace, by an execution debtor against a constable, for goods levied on and taken, which he claims were exempt. Tried on appeal, by the court without a jury, and judgment rendered on the finding for plaintiff. Defendant appealed.

Plaintiff kept a drinking saloon, was married and residing with his family. When notified of the execution by the officer, he said he had no property except what was in the saloon, but did not offer to turn out any, nor intimate a purpose to claim his exemption. Afterward on the same day, appellant levied on the fixtures and personal property therein and locked the door, but removed nothing except two barrels of whisky, one keg of gin, one keg of port wine and one keg of brandy, which comprise all that was replevied or is in controversy, the residue having been surrendered. In the same evening or on the following morning appellee delivered to appellant, as a schedule, the following paper, which, with the appraisement and selection, are taken from the abstract and conceded to be correct :

"To E. J. Moffett, constable. In the matter of the execution in favor of Harvey & Son and against Thomas E. Sheehey. Schedule of all the personal property of the said Thomas Sheehey, a married man, and at the head of a family, made the 28th day of April, A. D. 1891.

"Chattel property, valuation fixed by appraisers :

"One saloon, bar and fixtures, known as the Oak Palace Saloon, in Clinton, Illinois, consisting of front and back mirror, bar, ice chest, cigar case, stand, and side mirror, one iron safe, one desk, all glassware and furnishing articles necessary and used in said saloon—one set of fixtures, \$601.50.

"In the running and operating the same, and all stock on hand, consisting of cigars, liquors, wines and beer, and all manner of stock at said place on hand—stock, \$188.70.

"And all the book accounts of said Sheehey, kept and appearing on the books against various persons, wearing apparel of debtor—book accounts, estimated, \$25.

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"One shot gun, two target rifles, all the several pictures on the walls of said saloon, one stove, all empty barrels and kegs in said saloon—shooting gallery, stoves and pictures, three guns, \$64. Total \$879.20.

"That the foregoing articles of personal property are under mortgage as follows: \$290 mortgage to Thomas Sheehey, Sr., and John Carroll, and \$448 mortgage to D. W. Brennenman & Co., all of which mortgages are wholly unpaid."

"Debts due and from whom due.... Name.... Nature of debt, whether note or account..... When due..... Amount....

"As here before stated, all debts due and owing are the accounts on the books of the debtor in his said saloon, consisting of accounts against various persons, and in various amounts, too numerous to mention in detail, all of which are ready to be produced for inspection."

Affidavit of Thomas E. Sheehey, stating that the above is a full, complete and true schedule of all the personal property, of every kind and character owned by him, including money on hand and debts due and owing him.

Sworn to April 28, 1891, before A. J. Richey, J. P.

Affidavit of appraisers that they would fairly and impartially appraise the property of Thomas E. Sheehey, set forth and described in the foregoing schedule, made April 29, 1891.

Report of appraisers, stating they had carefully examined the articles mentioned in the foregoing schedule of Thomas E. Sheehey, and had fairly and impartially appraised the value thereof at the sums by them set opposite said articles in said schedule.

Notice of Thomas E. Sheehey, appellee, in the words and figures following:

"To E. J. Moffett, constable and city marshal in and for the city of Clinton, DeWitt county, Illinois."

"I hereby select the following articles of those named in the foregoing schedule, which I desire to retain, viz.: Two barrels of whisky, one keg of gin, one keg of port wine and any and all of the stock of cigars, wines, whiskies

and stock on hand, heretofore scheduled and used in running the Oak Palace saloon, in Clinton, Illinois. Also the fixtures, consisting of bar, mirror, stoves, one safe, desk, pictures there, and all of the articles of furniture, comprising the bar in said saloon, embracing all mirrors, pictures and glassware, and any and all book accounts showing, and all articles levied on by the said Moffett, and in the building known as the Oak Palace saloon, one shot gun, two target rifles, and that said property are first subject to the two mortgages heretofore mentioned in this schedule on opposite page."

"THOMAS E. SHEEHY."

Appellant did not deliver the barrels and kegs of liquor mentioned, and the question is whether appellee, by the proceedings shown, was entitled to them as exempt from the execution, or more specifically, did he make, substantially, such a schedule and selection as the statute required, to entitle him to hold them.

That requirement is that the debtor shall "make a schedule of all of his personal property of every kind and character, including money on hand and debts due and owing to the debtor, and deliver the same to the officer having the execution," and after the appraiser shall have fixed a "fair valuation upon each article contained in said schedule," he shall "then select from such schedule the articles he may desire to retain, the aggregate value of which shall not exceed the amount exempted, to which he may be entitled" (which in this case was \$400 worth), "and deliver the remainder to the officer having the writ." R. S., Ch. 52, Sec. 14.

The schedule should list separately each article of a distinct kind, or of a distinct quality, grade or description of the same kind, to enable appraisers the more readily to fix the value of each article contained in it. How else would they certainly know when or whether they had examined "all glassware and furnishing articles," "all stock in hand, consisting of cigars, liquors, wine and beer, and all manner of stock" or "all empty barrels and kegs" in a saloon indicated?

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And why should they be subjected to the labor of examining each of an unstated number of articles of the same kind, grade, quality and description? Such articles should be listed by the number of pieces, yards, gallons, bushels, or the like, so that they would need only to ascertain the number, examine a sample, appraise the lot accordingly, and leave the claimant debtor to the risk of selecting them as of such number and value. Appellee, then, did not make such a schedule as the statute contemplated.

Nor was the appraisement such. The schedule appears in the record as in the abstract, in four separate and distinct groups, each of which mentioned miscellaneous articles in a lump, and the property was appraised in the same way. There was no fixing of a "fair value upon each article." The officer and the appraisers, or either, might well have objected to the schedule, and the debtor to the appraisement, but neither made an objection. The debtor accepted the appraisement as made, and so waived its imperfection. His schedule suggested, occasioned and excused it. The first fault was his own. He made his selection, if it may be so called, upon the appraisement made. But he did not limit it to articles not exceeding in aggregate value the amount exempted. He was bound to select them at their appraised value. *Finlen v. Howard*, 126 Ill. 262. What he selected embraced all that was scheduled. It was appraised at \$879.20, and he was entitled to only four hundred dollars' worth, showing an excess of \$479.20. The officer could not select for him nor change the selection he made. If the schedule and appraisement as made did not enable him to select specific articles at any appraised value, he should have sought to have them corrected. But it is evident that if each article had been appraised and the aggregate had amounted to what it did, he would have demanded them all, just as he did, because he supposed the amount of the mortgages upon them should be deducted in their appraisement. Otherwise he could have had no reason for stating the fact and amount of those mortgages in his schedule.

And the court below seems to have taken that view of

the law. We do not concur in it. Appellee's interest in the property was not an undivided part, a lien, or an equitable claim. As stated in his affidavit for the writ of replevin he was the owner and entitled to the possession of the specific articles in controversy. He was the absolute owner as against the execution creditor and the officer. And as against the mortgagees also, subject only to the lien of their mortgages, respectively, which they were not bound and might never be disposed to enforce. His interest, notwithstanding the mortgages, was subject to the execution, which could be levied upon the property. All the proceedings under this statute show that it contemplated only specific tangible articles of property, which could be taken, delivered, returned and replevied. An equity of redemption, a mere lien or equitable claim, without possession, are susceptible of neither. Appraisers are authorized and required only to fix the fair value of what they can see and at what they can ascertain by inspection and handling. They have no power or authority to consider and adjust equities in it between the execution debtor and third parties, to ascertain whether his mortgage was given for money borrowed, for future advances, or for indemnity to the mortgagee against a liability which might or might not arise (as was shown and admitted to be the case with one of the mortgages here), whether there was usury in it and how much had been paid, or any like questions. These are beyond their fitness as well as their authority to determine. They do not affect the fair value of the property. If the execution debtor takes it as exempt, he must take it at that value, unaffected by other liens upon it. If he has given a mortgage upon it the presumption would be that he has had and enjoyed so much of its value, and there is no hardship in denying to him the claim to have it again. In this proceeding he is not authorized to set up a claim for the mortgagee that is not prejudiced by the execution.

For the reasons thus stated the judgment will be reversed and the cause remanded.

Colfax Coal and Mining Company v. Adolph Johnson.

1. **MASTER AND SERVANT**—*Master Not a Warrantor of Appliances.*—The master does not, as to an employe, warrant that appliances furnished are safe, but only that he has not failed to use reasonable care and precaution to have them safe and suitable for the use to be made of them.

2. **NEGLIGENCE**—*What the Plaintiff Must Show.*—In an action for damages resulting from the breaking of a chain, in order to recover it was incumbent upon the plaintiff to show, so far as his right of recovery is based upon the insufficiency of the chain, not only that the chain parted and broke, but that the company ought, had it exercised reasonable care, to have discovered that it was deficient.

3. **BURDEN OF PROOF**—*Inspection of Appliances.*—The proposition that an inspection of appliances would have discovered the defect is an affirmative one to be shown by the evidence, and the burden of proving it rests upon him who asserts it.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed December 22, 1893.

The opinion states the case.

WELTY & STERLING, attorneys for appellant.

KERRICK, LUCAS & SPENCER, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the sum of \$2,000, rendered in an action on the case brought by the appellee against the appellant company.

The declaration contained four counts. It was averred in the first count that the appellee was employed by the appellant company as a laborer to work together with others in its coal mine, under the control and direction of one Peter Recane as foreman; that said foreman, acting for the appellant company, attempted to lower into the mine a large log, suspending it by means of a chain under the cage; that the chain was insufficient to sustain the weight of the log, and

52	383
86	155
52	383
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that Recane, the foreman, ought, and in the exercise of ordinary care could, and would have known that the chain was so insufficient, and that while the plaintiff, in the exercise of due care for his own safety, was pushing and pulling at said log as he was ordered by said foreman to do, the chain broke and the log fell upon the plaintiff and crushed, bruised and mashed his leg, etc.

The second and third counts do not differ in any material respect from the first, the injury received being attributed in each of them to the alleged insufficiency of the chain.

The fourth count alleges that the appellant company was negligent (1) in using a chain that was insufficient for the purpose (2) and that its foreman, Peter Recane, ordered and "directed the appellee to push and pull at the log, knowing that it was suspended only by said chain."

The evidence shows that appellee and four others, employes of the appellant company, were engaged in lowering timbers into its mine, to be used in laying and repairing the tracks and supporting the roof of the mine. John Carlson and one Anderson, two of the men thus employed, were stationed at the surface of the ground, while the appellee, Frank Carlson and Peter Recane were at the bottom of the shaft. The smaller timbers were placed in the cage by the men at the mouth of the shaft and let down, but larger "sticks" or logs were suspended by chains to the bottom of the cage and thus lowered.

The appellee, who was an experienced mine laborer, testified that "both ways were safe ways to let logs down," and that it was usual and customary in all the mines in which he had worked to lower small timbers in the cage and fasten heavier sticks or logs to the bottom of the cages by chains and thus let them down.

Two chains were used in attaching the logs to the cage; one was fastened to the cage, the other wrapped around the log and the two then linked or tied together. The appellee had, as he testified, frequently put the chain on logs and taken them off, and fully understood all about the work in which he was engaged.

On the occasion in question, it became necessary to lower a heavy piece of timber, and Peter Recane directed the appellee to bring a chain to be sent up in the cage. The appellee testified that he knew what the chain was to be used for and where to find it. He went and got it and it was sent up in the cage to the workmen at the top of the shaft. They received it, attached the timber or log to the bottom of the cage with it, and lowered the cage and timber safely to within about five feet of the bottom of the shaft where the appellee, Recane and Frank Carlson stood to receive and load the timber on a car. They endeavored to lift and swing the stick of timber or log onto the car, and while so engaged, the chain that was around it broke and it fell upon the appellee's leg and inflicted the injury sued for. As to this, the appellee testified: "I went to the timber to lift up one end high enough to get it onto the car. I lifted up the end of the timber and couldn't make it that time and laid it back again, and Peter Recane said, 'Go at it again.' I took hold of the timber and lifted it as high as I could, and the chain broke—the chain that the timber was hanging in—and the timber fell." Though the others who were present, testified, no further information was elicited as to the cause of the breaking of the chain or otherwise, as to the manner in which the unfortunate appellee received his hurt.

The appellee alleged that his injury was occasioned by the negligence of the appellant company (1) in furnishing an insufficient chain, and (2) in directing him, through Recane, to "push or pull or lift the log, well knowing that it was held only by the chain." It was not enough that the appellee should prove that he was injured, but it was incumbent upon him to prove that his injury was the result of negligence, as charged, on the part of the appellant company. Has he done so? There is an entire absence of proof as to the cause of the breaking of the chain. The fact that it did break, does not show that the appellant company was guilty of negligence. The duty of the company was to use ordinary care to provide a suitable and safe chain, and con-

duct the operation with reasonable care. The master does not, as to an employe, warrant that appliances furnished are safe, but only that he has not failed to use reasonable care and precaution to have them safe and suitable for the use to be made of them. Cooley on Torts, p. 557. The chain used on the occasion in question had been frequently successfully used, for the same purpose. As to it the appellee testified: "I knew the trace chain was around the log. They had lowered logs with it before; had seen him do it frequently, and I had put it on and taken it off logs."

It is clear the appellee knew as much about this chain as any one else, and equally clear that he regarded it as sufficiently strong. It had served like purposes frequently before to his knowledge. He had no cause to suspect that it would prove insufficient, much less had the master. Why did it break or part on this occasion? Was it worn out by use, or was there a defect in one of the links? Had it become weakened by rust, or one of the links cracked, or was there a flaw in the iron? The evidence furnishes no answer. In order to recover, it was incumbent upon the appellee to show, so far as his right of recovery was based upon the insufficiency of the chain, not only that the chain parted and broke, but that the appellant company ought, had it exercised reasonable care, to have discovered that it was deficient. Ought we conclude that the appellant company was negligent in failing to cause the chain to be inspected, when it is not shown that the defect in the chain, if any there was in it, was one which an inspection would have disclosed?

It is said in *Sack v. Dolese et al.*, 137 Illinois, 129, that the proposition that an inspection would have discovered the defect is an affirmative one to be shown by the evidence, and that the burden of proving it rests on him who asserts it.

The evidence does not affirmatively show that there was any defect in the chain, nor can it be said that it must be concluded from the nature of the accident that some defect did, in fact, exist. It sustained the weight and bore the strain upon it until an effort was made to lift or swing the

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timber on the car. It broke while the appellee and Recane were endeavoring to put the log upon the car. Liability of the appellant company is attempted to be predicated upon the alleged negligence of Peter Recane, in ordering the appellee to pull and push at the log, while suspended by that chain, for the purpose of placing it upon the car. We do not understand that it is claimed that the manner in which Recane sought to get the log upon the car was unusual or in itself dangerous or negligent, but that it became so because of the supposed insufficiency of the chain, and this being true, the argument or claim that liability is shown, fails, unless supplemented by proof, that the chain was defective or insufficient. This proof, we have seen, is wanting.

Moreover, there is nothing in the evidence tending to show that the attempt to get the log upon the car was unusual, dangerous or negligent in its character or in the manner of its attempted execution, or that the order to pull upon the log would likely result in breaking the chain. The appellee, Carlson and Recane, engaged in the effort to pull and lift the log upon the car, and while so doing the chain broke. How or why is not shown. That it was caused by negligence imputable to the appellant company is not established by proof of the accident, and liability can not be predicated upon mere conjecture as to the cause of the accident.

The principles announced in the opinion of Mr. Justice Moran, of the First Appellate District, rendered in the case of *Sack v. Dolese et al.*, which was approved and adopted by the Supreme Court in the same case on appeal (137 Ill. 129), are aptly applicable to the questions arising in the case at bar and seem to be decisive against a right of recovery upon the case as made by the proof herein.

For the reasons indicated, the judgment must be reversed and the cause remanded.

Z. K. Wood & Co. v. Edward Roach.

1. **SALES**—*When the Title Passes—Delivery.*—To constitute a sale of a part of a lot of corn in the crib, so as to pass the title to the vendee of the portion sold, there must be a separation and identification of the part from the common mass.

2. **SALES**—*Delivery a Question for the Jury.*—The question as to whether there has been a delivery of goods sold, is one of fact for the jury.

Memorandum.—Assumpsit for goods sold. Appeal from the Circuit Court of Logan County; the Hon. ROBERT HUMPHREY, County Judge, presiding. Heard in this court at the May term, 1898, and affirmed. Opinion filed October 28, 1898.

The opinion states the case.

APPELLANT'S BRIEF.

When the question of title arises between the vendor and vendee, or purchaser of the vendor with notice, it is not necessary to go through the form of actually measuring and separating the part purchased from the whole. If it be the intention of the parties, the title will be transferred without any act to distinguish it from the mass, where it is of uniform quality and value.

1 Benjamin on Sales, Sec. 477, Corbin's edition, after commenting upon some cases that follow the English doctrine, states the rule in this country as follows:

"Notwithstanding the decisions above stated, the weight of recent American authority supports the proposition that, where property is sold, to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. This intent will be inferred from the fact of payment of the price, or from delivery of the whole to the buyer with power to make separation. Where the property is in possession of a third person, the intent will be manifested by giving an order to such third person to deliver a specified part, or by assigning a certificate of deposit, such as a receipt for part of grain in

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mass in an elevator. If in the possession of the vendor, he may constitute himself bailee. The reason is because selection is immaterial where the quality is uniform."

The author cites many authorities in support of the text. *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; *Kimberly v. Patchin*, 19 N. Y. 330; *Hurff v. Hires*, 40 N. J. Law, 581.

There is a well settled legal distinction between the individual rights of several parties in goods of uniform kind and quality, and those in which there is no uniformity in these respects. *Iron Cliffs Co. v. Hull*, 42 Mich. 86; *Young v. Miles*, 20 Wis. 646; *Wagar v. Detroit L. & N. Co.*, 79 Mich. 648; 44 N. W. Rep. 1113.

In this State, it is held that the intention of the parties controls, and between vendor and vendee no actual delivery is necessary to vest the title in the vendee. *May v. Tallman*, 20 Ill. 443; *Wade v. Moffett*, 21 Ill. 110; *Bell v. Farrar*, 41 Ill. 400; *Hart v. Wing*, 44 Ill. 141; *Graff v. Fitch*, 58 Ill. 373; *Shelton v. Franklin*, 68 Ill. 333; *Barker et al. v. Bushnell et al.*, 75 Ill. 220; *Broadwell v. Howard et al.*, 77 Ill. 305; *Foster v. Magill*, 119 Ill. 75; *Cloke et al. v. Shafroth et al.*, 137 Ill. 393.

APPELLEE'S BRIEF, J. A. HORN AND J. T. & F. M. HOBLIT,
ATTORNEYS.

To constitute a valid sale so as to pass the title of an uncertain and unidentified part of a larger mass of personal property, such as bricks in a kiln or corn in a crib, there must be a separation and identification of the part so sold from the common mass. No title passes to the vendee until this is done. *Dunlap v. Berry*, 4 Scam. 327; *Graff v. Fitch*, 58 Ill. 373; *Anderson v. Crisp*, 31 Pac. Rep. 638; *Am. Dig.* (1893) 202; *Benjamin on Sales*, 422-423, 441, 442, 443 (Sixth American Edition); *First National Bank of Marquette v. Crowley*, 24 Mich. 492; *Hahn v. Fredericks*, 30 Mich. 224; *Crapo v. Seybold*, 35 Mich. 169; *Ormsby v. Machlin*, 20 Ohio State, 295; *Woods v. McGee*, 7 Ohio, 466; *Golden v. Ogden*, 15 Penna. 628; *Haldemon v. Duncan*, 51 Penna. 66; *Stone v. Peacock*, 35 Maine, 385-8; *Courtright v. Leonard*, 11

Iowa, 32; Rosenthal v. Risley, 11 Iowa, 541; Cook v. Logan, 7 Iowa, 142; Ropes v. Lane, 9 Allen, 502; Reeder v. Machern, 57 Md. 56; Ferguson v. Louisville Bank, 14 Bush, 555; Davis v. Hill, 3 N. H. 382; Messer v. Woodman, 22 N. H. 172; Bailey v. Smith, 43 N. H. 141.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellants are grain dealers. The appellee is a farmer. On the 29th of August, 1891, he contracted to sell to them one thousand bushels of corn to be delivered on or before December 25th following.

A small sum was then advanced on the corn and later another and larger advance was made.

The corn was not delivered within the time fixed and the time was extended by mutual consent.

Some corn was delivered in February, but the greater part in August and September, 1892.

Much more than the thousand bushels originally contracted for was delivered and when the parties came to a settlement, the appellants proposed to retain the price of seventeen hundred bushels on the ground that as to that portion of the corn so delivered to them, one W. S. Hunter was the real owner under a contract of sale between him and the appellee.

This proposition was not acceptable to the appellee, who denied that he had sold any corn to Hunter and demanded payment for all he had delivered to appellants.

Failing to obtain such payment he brought the present suit, which came to trial before the court, a jury being waived, and resulted in a judgment in his favor for \$771.58.

The record is brought here by the appellants (defendants below) and the question is as to the propriety of the judgment. No questions of law were presented in the form of propositions to be held or refused by the court.

It is to be presumed the court properly understood and applied the law pertaining to the case, and as to the facts the finding of the court is entitled to the same weight as the verdict of a jury.

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It appears that appellee was indebted to said Hunter, and that the indebtedness was secured to some extent by chattel mortgage; that Hunter went to the farm of appellee and desired to get his demand in more satisfactory condition. According to his version of the matter he inquired of appellee how much he owed other parties and was told that he had contracted about \$125 worth of the corn to grain dealers in Latham, appellants probably; that Hunter then proposed to buy appellee's corn or so much of it as would not be required to pay the grain dealers, to which appellee assented, and then Hunter proceeded to measure the six cribs in which the corn was stored and ascertained that there was about twenty-two hundred bushels in the whole mass. Hunter says that he then suggested that he would take seventeen hundred bushels, and thus leave enough to satisfy the grain dealers. There is some conflict as to what then passed between the parties verbally, but the following writing was executed by appellee and given to Hunter.

"ILLIOPOLIS, ILLINOIS, April 11, 1892.

I have, this day, sold to W. S. Hunter, of Chicago, Illinois, seventeen hundred bushels of corn, now in cribs, on Yates farm, seven miles N. E. of Illiopolis, and agree to deliver same at elevator, either at Latham or Niantic, at such time as he may designate, except during the cropping season. The price paid is thirty cents per bushel, the receipt of which is hereby acknowledged.

EDWARD ROACH.

Witness: GEO. A. MERRIMAN."

Hunter says he understood that he received possession of the corn then and there, and that the expression in the contract as to delivering the same at the elevator meant merely that appellee was to haul it there, and, in the meantime, was to retain it for him as his bailee. Appellee denies this, and, indeed, denies that he knew he was signing the paper as it appears, and insists that he did not intend to sell the corn to Hunter, but, as is to be inferred from his evidence, that he did intend to give Hunter some right or lien thereon in respect to the admitted indebtedness.

It is agreed that, after the paper was signed and before Hunter went away, he promised to give appellee the benefit of any advance in the price of corn. Hunter says that as soon as he could thereafter, he indorsed on the notes he held against appellee a credit of \$500 for this corn. There is in the record some evidence on each side, consisting, chiefly, but not wholly, of written correspondence, tending more or less to support the respective positions of the parties.

It is clear that, unless the title to the corn passed to Hunter, so that it would have been his loss had it been destroyed without the fault of the appellee, the appellants were not justified in withholding payment.

If the corn was not delivered to Hunter when the paper was signed, it never was; and unless it was the intention of the parties that the possession should then pass to the buyer, it can not be said that the contract was so complete as to invest him presently with the title. The appellee might have been constituted the bailee of Hunter, and though there was no segregation of the 1,700 bushels from the entire mass, and no agreement as to what particular portion should belong to Hunter, yet, if the property was uniform in kind and quality (as might be presumed), it was competent for the parties to agree that the buyer should then have possession, and that the title should then pass to him, so that the risk of ownership should then devolve upon him.

This the parties certainly might have done, so far as their own rights were concerned, no question of the rights of creditors or purchaser without notice being involved.

But whether they so intended is a question of fact.

It is not deemed necessary to state more in detail the evidence in the case, nor to discuss the positions respectively assumed by counsel in their arguments.

We are not prepared to say that the conclusion reached by the trial court is erroneous.

We must say there was enough evidence, on behalf of appellee, to support his contention, if unopposed by that on

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behalf of the appellants. How we might decide the matter if it were before us for our finding in the first instance, is not important.

Unless we can say that the finding is clearly and palpably against the facts, we may not interfere.

The judgment will be affirmed.

City of Paxton v. Jennie A. Frew.

1. CITIES AND VILLAGES—*Duty in Relation to Sidewalks.*—Where a walk becomes old and worn out it is the duty of the city to cause the planks or boards of the walk to be inspected, and such as are found so weak, old, worn or thin as to be insufficient, to be taken out and replaced by planks sound and strong enough for the ordinary purposes of a sidewalk.

2. CITIES AND VILLAGES—*Liability for Old and Worn Sidewalks.*—Where a sidewalk from use for years becomes worn and out of repair, and the city instead of removing all wornout boards and replacing them with new, continues the walk in use, trusting that by frequent inspection it may discover all breaches or holes before any one would fall into them, it will be held to have notice of the condition of the walk.

3. CITIES AND VILLAGES—*Not Required to Keep Constant Watch Over Walks.*—A city is not required to keep constant guard and watch over walks supposed to be safe and sufficient, to see that some one does not break holes into or destroy them, or that such breaches do not occur from other unexpected causes.

4. CITIES AND VILLAGES—*Liability for Defective Walks—Notice.*—In order to charge a city with liability for injuries occasioned by broken walks or holes made in a walk, it must appear that the city had actual notice of the existence of the breach or hole, or that the defect had existed for such length of time that the city in the exercise of ordinary diligence ought to have discovered and remedied it.

5. CITIES AND VILLAGES—*Construction—Notice of Defects.*—The rule that the city must have notice of defects has no application to relieve it from liability when it is charged with knowledge that the material of which a walk is composed is insufficient for the purpose, and chooses to omit the duty of making the walk safe, but adopts the policy of attempting to discover and repair breaches that may be occasioned because of such insufficiency of the material before any one is injured.

6. INSTRUCTIONS—*Assuming Facts.*—It has never been held erroneous to assume in any instruction the existence of an uncontroverted fact.

7. EXCESSIVE DAMAGES—*Question Can Not Be Raised for the First*

Time in the Appellate Court.—Where it was not urged in the motion for a new trial, nor assigned for ground of error, that the damages are excessive, the Appellate Court will not consider an instruction upon the question of damages in order to determine whether or not it is abstractly right.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Ford County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

COOK & MOFFETT, attorneys for appellant.

M. H. CLOUD, E. C. GRAY and A. E. DEMANGE, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

When attempting to pass over a sidewalk in the appellant city, the appellee stepped into a hole in one of the planks of which the walk was composed, and received a violent fall. This action was case to recover damages for the injuries thus sustained. The judgment below upon the verdict of a jury, was for the appellee, her damages being assessed at \$600. This is an appeal from said judgment. The evidence bearing upon the questions whether the city had used reasonable diligence to keep the walk in a reasonably safe condition, and whether the appellee had notice or knowledge of the alleged unsafe condition of the walk and exercised ordinary care for her own safety, we find to be quite sufficient to support the conclusion reached by the jury. Unless error is found in the instructions of the court, there is no ground for the interference of an appellate court. Complaint is made that the first instruction given for the appellee entirely ignores her legal duty to use ordinary care, and is so worded, as to assume as being uncontroverted, that the walk was unsafe. The purpose of this instruction and its purport was to advise the jury that the appellee might lawfully assume that the sidewalk was safe and attempt to pass along it upon

the faith of such presumption, and that the jury were to assume that she had no knowledge that it was not safe unless such knowledge was proven. While it is true that in order to recover, the appellee must have used ordinary care in passing over the walk, and that reference to that legal requirement might have been not inappropriately made in the instruction, yet we do not think the omission could have operated to mislead the jury even if a reference to or acknowledgment of the existence of such duty was necessary to a perfect instruction. The evidence as to the care or prudence of the appellee was that she was passing along the walk after dark (though not at an unusual hour), in the ordinary way as others would, and there is no reason to believe or intimation to be found in the evidence that there was any negligence or lack of care on her part. If the circumstances under which an injury was received are known and proven, that the injured person exercised due care may be presumed, if there is no proof that such person was negligent, or failed to exercise proper caution. That she was charged with the duty of exercising ordinary care for her own safety was impressed upon the jury by the 5th, 6th, 7th and 13th instructions given in behalf of the appellant. To hold that in addition thereto that duty should have been referred to in another instruction, the only purpose of which was to state the legal principle that every person not advised to the contrary, might assume that a walk is safe, and that a failure to do so should be deemed a fatal omission and defeat a right of recovery, would be wholly unjustifiable. It is complained that the instruction under consideration might have been understood by the jury to imply that the court assumed that the walk was in fact unsafe. Even if such an implication might be drawn from the language employed in the instruction, it would not furnish cause for reversal of the judgment. The evidence showed, without contradiction, that one of the planks in the walk had been broken between two stringers, leaving a hole in the walk nearly six inches in depth and twelve inches in width, into which the appellee stepped.

The appellant city did not contest the truth of this. Its counsel in the brief filed in this court say: "We claim that the hole into which she stepped was of such recent origin, that the city could not have known of its existence without the exercise of the very highest degree of care and diligence. Appellant claims that the hole was there but a few hours; that it was broken by some force from the top," etc. It has never been held erroneous to assume, in any instruction, the existence of an uncontroverted fact. The purpose of the fourth instruction in behalf of the appellee, was to advise the jury as to the measure of damage, and after doing that in a manner not complained of, the instruction concludes by directing the jury, that from all the evidence in the case they may determine the amount they believe she is entitled to recover. The objection urged is that the amount to be recovered is not what the jury may believe the plaintiff entitled to, but such damages only as the evidence shows have been sustained.

It was not urged in the motion for a new trial, nor is it assigned as ground of error in this court, that the damages awarded by the verdict are excessive. The supposed misdirection could only in that respect have prejudicially affected the appellant city and no complaint of that character having been made in the Circuit Court, and none being made here, we find no occasion to enter upon a discussion of the fourth instruction in order to determine whether or not it is abstractedly right.

As we said before, the city did not pretend to deny the existence of a dangerous hole in the walk into which appellee stepped. The defense sought to be made was, that the city did not have actual notice of the defect; that the hole came in the walk by the breaking of a plank and that the plank had been broken so recently before the mishap to the appellee, that the city, though exercising ordinary diligence, had not discovered it. Excluding the evidence in behalf of the appellee, and considering only that produced in behalf of the city, we think the defense was not made good. From the evidence it appeared that the walk

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was located in close proximity to the public school grounds, and had been constructed some ten or twelve years, and was composed of pine boards or planks, originally an inch or an inch and a quarter in thickness, laid crosswise upon wooden stringers. Mr. Robinson, superintendent of schools, as a witness for the city, testified that many of the planks of the walk were old and thin and so weak that they were easily broken. That the children attending the school layed about and upon the walk, and that the planks would be broken by the boys in running across or playing on the walk; that the boys could stamp their feet through many of the planks, and he had known them to do that several times. Edwin Grayson, Fred Fitzsimons and Ross Mercer, pupils of the schools, witnesses for the city, testified that the planks of the walk were so old, weak and worn there, that they would often break through when the boys were running and playing on them, and that the boys could and did frequently stamp their feet through the boards of the walk and leave holes in it.

Mr. Swanson, city superintendent of the streets and a witness for the city, stated that the boards in the walk could be and were broken through by the boys; that "the boys jumped up and down on them with their heels and broke them through;" that "he knew they were constantly broken for some time before the plaintiff was injured;" and that "he fixed holes in the walk nearly every week." The superintendent of schools and the pupils before named, as witnesses for the city, stated that the superintendent of streets, or other employes of the city, visited the walk, and repaired the breaks and holes in it at least once a week, and often twice a week for a period of one month or more before the occasion of the injury to the appellee. It thus appeared that the planks of the walk were so weak, old and worn that they gave way beneath the feet of the boys of school as they ran, played and jumped upon them, leaving holes into which a passer-by might, at any time, step or fall, and that other planks were so weak that the boys of the school could and frequently did stamp their feet through the walk,

creating like breaks and openings in it, and that such holes were frequently, or as the superintendent of streets said, "constantly" being made in the walk, and it further appeared from the testimony of the city authorities, that the city knew of the unsafe character of the walk, and that dangerous holes were being constantly found by the breaking away of the planks. The manifest duty of the city was to have caused the planks or boards of the walk to be inspected, and such as were found so weak, old, worn or thin as to be insufficient, to be taken out and replaced by plank sound and strong enough for the ordinary purposes of a sidewalk; but instead of doing so, the city continued the walk in use, trusting that by frequent inspection its superintendent, or some of his employes, happily might discover all breaches and holes that would most likely be made in it before any one would fall into them. It must be admitted that the street superintendent and his employes made frequent visits to the walk for the purpose of discovering and repairing new breaches and holes in it, but unfortunately the appellee stepped into a hole broken in the walk between such visits of the repairing force. Whether this particular hole had been in the walk such a length of time that the city, in the exercise of ordinary diligence, ought have discovered it, was the subject of much conflicting testimony, and so conflicting, in fact, that its determination was so fairly a question for the judgment of the jury, as to be beyond the interference of an appellate court. But if such were not true, we would not be justified in disturbing the verdict.

A city is not required to keep constant guard and watch over walks, supposed to be safe and sufficient, to see that some one does not break holes into, or destroy them, or that such breaches do not occur from other unexpected causes. Hence the rule, that in order to charge a city with liability for injuries occasioned by broken walks or holes made in a walk, it must appear that the city had actual notice of the existence of the breach or hole or that the defect had existed for such length of time that the city in the exercise of ordinary diligence ought have discovered and remedied it.

Such a rule has no application to relieve from liability a city when it is charged with knowledge that the material of which a walk is composed is insufficient for the purpose, and chooses to omit the duty of making the walk safe, but adopts the policy of attempting to discover and repair breaches that may be occasioned because of such insufficiency of the material, before any one is injured. In such cases the city can not complain if the courts require of them what they have voluntarily undertaken to do, that is, discover and repair the defects before any one is hurt, or be liable for the injury occasioned. It is complained, and not unjustly, that the sixth instruction given for the appellee contravenes the rule that particular portions of the evidence should not be selected and given apparent undue prominence.

The facts thus supposed to have been given unwarranted prominence were brought into the case by the witnesses produced by the appellant, were not controverted, and comprised all the material facts upon this particular matter involved, or so nearly all of such facts, that we can not conceive that any real injury was occasioned by the instruction. Objections are urged against the third and seventh of the appellee's instructions, but we find no defect in either so substantial or immaterial as to demand a reversal of judgment so clearly right upon the conceded and undisputed facts. The judgment is affirmed.

John W. White v. Gresham & Mann.

1. **WARRANTY—Implied and Expressed.**—Where a manufacturer furnishes machinery or appliances designed for a specific use, he impliedly warrants the quality of the material, the goodness of the workmanship, and that the machinery or appliance is reasonably suited for the purpose for which it was designed and sold. But this implied warranty can not be availed of if the articles are sold upon an express warranty as to such quality, workmanship and fitness.

2. **WARRANTY—No Particular Form of Words Necessary.**—A warranty may be gathered from the acts and conversation between the parties. No particular words are necessary to constitute a warranty.

Memorandum.—**Assumpsit.** Appeal from the Circuit Court of Vermilion County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1898.

The opinion states the case.

CALHOUN, STEELY & JONES, attorneys for appellant.

SALMANS & DRAPER, attorneys for appellees.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

In this action, which was brought by the appellees to recover the price of a steam heating apparatus placed by them in appellant's hotel, a judgment was rendered against the appellant, who appeals to this court. It is conceded that the agreement between the parties only required radiators to be placed in the office, dining-room and pantry of the hotel. The appellant contended that the appellees warranted that the radiators contracted for would heat the rooms in which they were placed to a temperature of seventy degrees, and that they wholly failed to heat the office, and that the dining room was often uncomfortably cold at meal hours. It was for this reason he refused to pay the appellees' demand.

The appellees denied that any specific warranty in this respect was given, but insisted that the contract between the parties only required them to place in the office, dining room and pantry, a specified number of radiators having an agreed and stated heating surface. They agree that the amount of such radiation of heat from the surface was estimated by them to be sufficient to heat such rooms provided the stairway leading from the office to the upper story of the hotel building was closed up so that the heated air could not escape into the halls and rooms of the second floor. Appellees contended that the appellant agreed that the stairway should be so closed and that the necessary radiating surface was determined upon that basis; that the stairway remained open, and that any failure of the apparatus to properly warm

the rooms in question was attributable to this open stairway and not to any defects in or insufficiency of the radiators or other parts of the heating apparatus. The appellant denied that he was under any obligation to close the stairway, but testified that he called the attention of the appellees to it while they were examining the building and getting the dimensions of the rooms. That they fully considered the effect of the opening made by the stairway and insisted that they could, and agreed that they would, heat the house without requiring any change to be made in it, and that he did not agree to shut up the stairway, etc. This contention constituted the material issue of facts for the determination of the jury. The evidence bearing upon the issue was conflicting. It was peculiarly the province of the jury to determine it, and we have no warrant to interfere with their finding, unless the result reached by them was manifestly wrong, or was contributed to, or produced by some error found in the instructions of the court or its ruling in reference to the admissibility of evidence.

We can not say the finding was manifestly wrong or against the weight of the evidence, and while complaint is made of certain of the instructions given for the plaintiff, yet the supposed errors in such instructions do not refer to this issue of fact, nor is it contended that they did or could have misled or confused the jury in relation to it. It is urged that the court refused to admit competent testimony tendered by the appellant, which would have supported the appellant upon the issues.

The appellant propounded to William White, clerk of the hotel, and a witness in his behalf, this question:

Q. What would you say as to putting doors on the landing there on those stairs, as to whether they could be put there and make it safe for the use of parties using the stairway?

The court, on motion of the appellee, ruled that the question should not be answered. The exclusion of such answer is a ground of complaint.

If the apparatus had been adjusted to the office and din-

ing room upon the agreement or understanding that the stairway would be closed, the fact, if true, that it could not be closed and be safe for the use of guests, would furnish no reason for a refusal to pay for the work.

Whether the closing of the stairway by doors or otherwise would affect the convenience or safety of his guests was a matter for the consideration of the appellant when engaged in arranging and contracting for the heating apparatus, and was in no sense proper for the consideration of a jury called to determine what contract he did then make.

The appellant testified that the stairway was seven feet wide; that it rose from the floor of the rear portion of the office to platform, thence turned west and rose to another platform, thence to the east until it reached and landed upon the floor of the main hall in the second story; and that the opening across the stairway at the turn was of the width of ten feet, and that the main hall of the second story was ten feet in width, thirteen feet in height and one hundred and ten feet long, and that a side hall of the width of twelve feet and fifty feet in length, opened into the main hall. It is a fact within the common knowledge and observation of every one, that the heated air of the office would pass into the upper halls and rooms by way of the stairway, and that radiators amply sufficient to warm the office alone would be wholly inadequate to the task of heating also the second story of the building. Large double doors opened into the dining room from the office. These doors were usually kept open during the hours when meals were served, and at such hours, it is plainly seen, that the inclosed stairway threw open the dining room as well as the office to the upper story of the building. It is therefore apparent that the contested question whether the stairway was to be closed was an important and material one. Indeed, it seems to us that upon its determination depended the final result. It is urged that the first and second instructions given for the appellee are materially erroneous. "The law," it is said by counsel for appellants, "raised an implied warranty that this apparatus was of sufficient capacity to heat those

rooms which these instructions completely ignore." It may be regarded as well settled, that where a manufacturer furnishes machinery or appliances designed for a specific use he impliedly warrants the quality of the material, the goodness of the workmanship, and that the machinery or appliance is reasonably suited for the purpose for which it was designed and sold. This implied warranty can not, however, be availed of if the articles are sold upon an express warranty as to such quality of workmanship and fitness. Benjamin on Sales (Bennett Ed. of 1888), Sec. 666; 10 Am. and Eng. Ency. of Law, page 109; 19 App. (Ill.)

Waiving the point that the appellees were not the manufacturers of the heating apparatus placed in the hotel, can it be said that there was an implied warranty that the radiators were of sufficient capacity to heat the rooms? The appellant contends there was an express warranty that the rooms would be heated to a temperature of seventy degrees by the radiators, and while counsel for the appellee deny that any express warranty whatever was made, we think that a warranty may and ought to be gathered from the acts and conversation between the parties. No particular words are necessary to constitute a warranty. The appellee assumed to know the capacity of the radiators and the number of feet of heating surface necessary to radiate the proper quantity of heat for the rooms in question. They measured and ascertained the dimensions of the rooms, and fixed upon the number of radiators for each room, and determined where such radiators should be placed in the rooms, and all this, coupled with their statements, confessedly made, amounted to a warranty that the radiators were in number and size sufficient for the purpose for which they were furnishing them.

Of these matters the appellee had a special knowledge upon which the appellant had the right to rely as an express warranty. But we are satisfied that the parties proceeded upon an understanding that the stairway was to be closed, and this constituted a material condition of the warranty.

The express warranty covered every ground of an implied warranty, and excluded all implications. Reference, therefore, to warranties by implication of law was properly omitted from the instructions.

Appellant insists that the action was prematurely brought as to a portion of the demand; that the proof shows that he was to have six months time in which to make payment for the boiler, and that the suit was brought before the expiration of the period.

The appellee purchased the boiler of Herbert & Co., who manufactured boilers. They were allowed a credit of six months upon it. They proffered to give the appellant the advantage of the credit if he would execute his note to them for the amount of the price of the boiler, if Herbert & Co. would accept the note of them. This Herbert & Co. agreed to do. The appellant refused to execute the note and now insists that the demand as to the boiler did not fall due until the expiration of the time he might have had, had he executed the note according to his contract. The position is not tenable. Time in which to pay for the boiler was not given as a part of the consideration of the agreement between the parties, but as the appellees had six months in which to pay for the boiler, they were willing that the appellant should, by executing a note which their creditor would accept, become paymaster of the debt and enjoy the privilege of the extension of time. The appellant refused to execute the note, hence is in no position to insist that he should enjoy a privilege, granted only on a condition which he repudiated and would not perform. One ground of appellant's motion for a new trial was that of newly discovered evidence—and this was supported by the affidavits of two persons—to the effect that the appellee, Mann, said in the presence of such affiants, that the appellees were to heat the rooms with the stairway open, and that the apparatus should not cost the appellant a cent if it failed to do so. It appears from the affidavits that the appellant was present when it is alleged the statements of Mann were made. One of the affiants, Mr. Crandall, was present at the trial and testified at some length as a witness for the appellant.

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The appellant's affidavit, which accompanied the motion for a new trial, is to the effect that he was present and heard the statements of Mann referred to in the affidavits, but had forgotten all about it. Certainly the court ought not to have re-opened the litigation upon such a showing. We find no substantial error in the record, and think the judgment right on the merits. It is affirmed.

Henry Funk v. William Howard.

1. **VERDICT—Upon Conflicting Evidence.**—When the evidence is conflicting and the jury have not been misled as to the law, the verdict will not be disturbed.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Vermillion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 23, 1893.

The opinion states the case.

SALMANS & DRAPER, attorneys for appellant.

MABIN & LORD, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$32.50 in favor of the appellee for work done by him in clearing the land of appellant.

It is insisted as the sole ground for reversal that the evidence did not sustain the verdict, because the contract under which the work was done was not completed by the appellee, and therefore he had no right to recover for what he had done.

On the other hand it is argued that there was no time set for the completion of the work; that without objection on the part of the appellant, it dragged along until the latter sold the land, and thus put it out of the power of the appellee to do anything further, and that the work done was well worth the amount claimed.

These contentions are each supported more or less by the proof, and we find no occasion to interfere with the conclusion reached by the jury. The abstract does not set out the instructions, nor is there any complaint of them in the appellant's brief, but we have read them in the record and found that the jury were advised fully as to the rights of the appellant upon the theory that the appellee had failed to perform his contract.

The jury must have been satisfied of the truth of the appellee's position on this point, and as they were not misled as to the law, their verdict, in view of the conflicting evidence, should be accepted as a finality. The judgment will be affirmed.

W. E. Haines v. H. H. Nance et al.

1. **BILLS OF EXCHANGE**—*What Is*.—The following instrument is a bill of exchange under Sec. 3, Ch. 98, R. S.

BUSHNELL, ILL., October 26, 1891.

To the Building Committee of the Methodist Episcopal Parsonage, Bushnell, Illinois.

GENTLEMEN: Please pay W. E. Haines, \$159.48, and charge to the account of John Livingstone.

2. **BILLS OF EXCHANGE**—*What is a Personal Acceptance*.—The following indorsement on the back of a bill of exchange:

H. H. NANCE,	} Building Committee for
JAS. COLE,	
J. B. SPICER,	

is the personal acceptance of the parties signing it and not that of the building committee.

3. **BILL OF EXCHANGE**—*Indorsements in Blank—Acceptances*.—An indorsement by a person in blank upon a bill of exchange is in legal effect an acceptance of it.

4. **BILL OF EXCHANGE**—*Acceptances—Parol Proof*.—An acceptance of a bill of exchange on its face absolute, can not be shown by parol to have been conditional.

Memorandum.—Assumpsit. Appeal from the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed October 28, 1893.

The opinion states the case.

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APPELLANT'S BRIEF, T. J. SPARKS AND BAILY & HOLLY,
ATTORNEYS.

The "order" spoken of in this case was nothing more nor less than a bill of exchange. Rapalje & Lawrence, Law Dictionary, 129; Randolph on Commercial Paper, 2.

The signing of the order by the defendants constituted an acceptance of it. Rapalje & Lawrence, Law Dictionary, 8; Randolph on Commercial Paper, 4; Norton v. Knapp, 64 Iowa, 112.

And if an acceptance is absolute on its face a contemporaneous condition can not be shown by parol. Byles on Bills, 196; Goodwin v. McCoy, 13 Ala. 271. As to drawee acceptor is liable as principal. Byers v. Franklin Coal Co., 106 Mass. 131; First National Bank v. Morris, 1 Hun, 680.

The acceptor of a bill of exchange is primarily liable for its payment even though he have no funds of the drawer in his hands. Crounse v. Kellogg, 20 Ill. 11; Diversy v. Moore, 22 Ill. 331; Novak v. Excelsior Stone Co., 78 Ill. 307.

The order in this case is a bill of exchange. In this State the words "or order," or "for value received," are not necessary to make an instrument negotiable. Revised Statutes (Starr & Curtis), Chap. 98, Sec. 3; Archer v. Claffin, 31 Ill. 306.

D. CHAMBERS, attorney for appellees.

STATEMENT OF THE CASE.

This was an action of assumpsit brought by the appellant against Nance, Cole and Spicer, appellees, as acceptors of the following instrument:

BUSHNELL, ILL., Oct. 26, 1891.

To the Building Committee of the Methodist Episcopal Parsonage, Bushnell, Illinois.

GENTLEMEN: Please pay W. E. Haines \$159.48, and charge to the account of John Livingstone.

Indorsed on its back:

H. H. NANCE,	}	Building Committee for M. E. Church Parsonage.
JAS. COLE,		
J. B. SPICER,		

The appellees together with Rev. R. E. Buckley and Cicero Hamilton, were appointed the Building Committee of the Methodist Episcopal Church Parsonage, of Bushnell, Illinois.

John Livingstone, the drawer of the instrument, entered into a contract with this building committee to build the parsonage, and executed and delivered to the appellant the instrument sued upon. The appellant presented it to the appellees, who indorsed it as shown by the copy here set out. The defense presented in the Circuit Court was that the appellees indorsed the order as members of the building committee with the intention of binding that body or the church corporation, and not themselves as individuals; that the money directed to be paid by the order to the appellant was for the purpose of discharging an indebtedness due from Livingstone, incurred long before the latter contracted to build the parsonage, and was in no wise connected with the erection of the building; and that Livingstone abandoned his contract and had no claim against or money due him from the building committee or the church. Against the objection of the appellant the appellees were permitted to introduce parol testimony in support of such defense. The appellees prevailed and the plaintiff appealed to this court.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

However strong the defense sought to be made may appear to be in merit or in point of equity, it can not prevail under the rules of law applicable to the instrument in suit and the act of the appellees in connection therewith. The instrument has all the qualities of a bill of exchange (3 Kent's Com., 74; Daniel's Negotiable Instruments, 493-495; Randolph's Commercial Paper, Vol. 1, page 2), except it does not contain words at one time deemed necessary to give it the quality of negotiability.

By the force and effect of Sec. 3, Chap. 98, R. S., the use of such words are no longer necessary to accomplish that purpose in this State. Its indorsement by the appellees, though in blank, was in legal effect an acceptance of it by

Haines v. Nance.

each one and all of them. Lawson's Rights and Remedies, Vol. 4, 1495; Randolph on Commercial Paper, Vol. 1, page 4. The acceptance being on its face absolute can not be shown by parol to have been conditional. Lawson's Rights and Remedies, Vol. 4, page 1498; Byles on Bills, page 196; Johnson v. Glover, 121 Ill. 283. Parol evidence tending to show that the appellees intended a different contract than that implied by the law from their acts was not admissible. Johnson v. Glover, *supra*; Courtney v. Hogan, 93 Ill. 101, and cases there cited. The liability created by the indorsement made by the appellees was their individual liability. No apt words were used by them to bind the church, or the building committee as an organization separate from the church, without which it has been held in many cases not distinguishable in principle from this, that the undertaking is an individual one. Powers v. Briggs, 79 Ill. 93; Burlingame v. Brewster, Id. 515; Hypes v. Griffin, 89 Ill. 134; Scanlan v. Keith, 102 Ill. 634. Cases supposed to support a view contrary to that which we have expressed will be found to differ from the cases we have cited only in the facts—not in the rule of law announced. Because of the error of the Circuit Court in admitting parol evidence to vary the contract implied by the law from the writing, and in rendering the judgment against the appellant, the judgment must be and is reversed and the cause remanded.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS

FOURTH DISTRICT—AUGUST TERM, 1891.

52 410
87 443

52 410
98 4440

Hopkins Loudon v. Robert H. Mullins, The Mullins Fluor Spar and Lead Mining Co. et al.

1. NUISANCES—*When Notice to Remove is Necessary.*—A person who comes into possession as grantee of land upon which there is a nuisance is not liable for merely permitting it to remain, until he has been notified or requested to remove it.

2. LIS PENDENS — *Who Are Purchasers.*—Where litigation relates merely to a moneyed indebtedness or the contention is over a mere demand for money, as in an action of trespass *quare clausum fregit*, there is no such *lis pendens* as will charge the property with the final judgment or decree in the case.

3. PROPOSITIONS OF LAW.—*Must be Submitted in Apt Time.*—Propositions of law submitted to the court for the first time upon the hearing of the motion for a new trial are properly rejected as not presented in apt time.

4. TRIALS—*Province of the Court When Acting in the Place of a Jury.*—It is the province of the trial court acting in the place of a jury to determine the weight and credit which ought to be given to the testimony of the several witnesses and give credit accordingly, and the Appellate Court will not disturb or set aside the finding, unless it is apparent the court misunderstood or disregarded material evidence introduced on the trial.

Memorandum.—Action for damages caused by flooding mines with water. Appeal from the Circuit Court of Hardin County; the Hon. R. W. MCCARTNEY, Judge, presiding. Heard in this court at the August term, 1891, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

W. S. MOERIS, attorney for appellant.

J. S. BUCHANAN and C. BUCHANAN, attorneys for appellees.

GEORGE DENISON, attorney for Robt. H. Mullins and the Mullins Fluor Spar and Lead Mining Co.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellant, claiming to be the owner and in possession of a tract of land containing about twenty-six acres, brought this suit to recover damages alleged to have resulted from a large quantity of water flooding his mines of spar on said tract, and compelling him to abandon the working thereof or to incur great expense in getting the water out, and putting said mines in working condition. Such flooding it is alleged was caused by high water and floods of the Ohio river that entered the mouth of a tunnel, dug and opened in January, 1888, by E. C. Johnson and others, tenants of The Good Hope Lead and Spar Company. There are no propositions of law submitted to the trial court necessary for us to consider and pass upon as we understand the record, because although that court was requested to hold certain written propositions to be the law, such request was not made in apt time. The cause was tried by the court, a jury being waived, and the trial commenced December 9, 1890, at which time appellant and appellees appeared by their respective attorneys. On December 12th the evidence was all in, and it was then agreed by the parties that the judge should hear arguments in chambers in vacation, decide the case and render judgment, and cause said judgment to be entered in the records in vacation. In accordance with this agreement and on December 29, 1890, the attorneys for the appellant and appellees appeared before the judge at chambers in vacation and argued the case. The court found the plea of the general issue was sustained, and that defendants were not guilty; that the plea of *liberum tenementum* was not sustained, and adjudged costs against plaintiff. On the same day the court made the order directing the clerk to enter the foregoing proceedings upon the records of the

court, and the same was done December 30, 1890. On January 9, 1891, plaintiff filed his motion "to set aside the finding and decision of the court and its verdict herein."

On June 9, 1891, it being one of the days of the April term, the motion was argued and overruled, and at the same time certain written propositions were submitted on behalf of plaintiff and the court was requested to hold the same to be the law. Indorsed upon the back of the paper upon which these propositions were written appears a statement signed by the judge, that they were presented to the court at the time of the argument of the motion, and were not presented on the trial of the cause. The court, therefore, held said propositions were not presented in apt time, and declined to pass upon them. In our judgment this action of the court was proper, and the error assigned, predicated upon this ruling, is not well assigned. Sec. 42 of the Practice Act provides, in all cases in any court of record of this State, if both parties shall agree, both matters of law and fact may be tried by the court, and upon such trial, either party may, within such time as the court may require, submit to the court written propositions, to be held as the law in the decision of the case, upon which the court shall write "held" or "refused" as he shall be of opinion is the law, or modify the same, to which either party may except as to the opinion of the court. This court in the case of C. W. L. & P. Co. v. City of Carlyle, 31 Ill. App. Rep. 325, in construing this section, held:

If the propositions were not presented during the trial, and not until after the court had heard the evidence and arguments of counsel and made the findings, such propositions came too late. The aid the court might have received from the propositions if submitted in proper time, had been lost. Our construction and ruling in that case, we think, was right, and no good reason has been furnished us for receding from it. The only material question remaining to be determined is, did the court err in finding defendants not guilty? We have examined the record as requested by counsel, and find the evidence sharply conflicting as to

whether the water coming in the tunnel and drift dug by the tenants, before mentioned, entered and flooded plaintiff's mine as complained of, either directly or by percolation or infiltration; or whether the flooding and filling up of said mine was caused by water flowing and entering therein from other sources. It was the province of the trial court, acting in the place of a jury, to determine the weight and credit which ought to be given to the testimony of the several witnesses and give credit accordingly. This we assume was done and the conflict in evidence settled in favor of appellees, and we will not disturb or set aside the finding unless it is apparent the court misunderstood or disregarded material evidence introduced on the trial. This is not the case, but we are of opinion the court was justified by the evidence in finding that the injury complained of resulted from water entering plaintiff's mine from sources other than said tunnel and drifts and entirely disconnected therefrom, and therefore properly found defendants not guilty. Having reached this conclusion, further remarks are perhaps unnecessary, but we will add that upon another ground plaintiff could not maintain this suit.

It is not claimed that the defendants dug, or caused to be dug, the tunnel complained of, or that it was dug, or caused to be dug and opened by "The Good Hope Lead and Spar Company," or its grantee, or by subsequent owners through whom, by mesne conveyances, the appellee corporation de-raigned title to the premises upon which said tunnel was dug and opened, but it is for the maintaining the same as a nuisance on said premises by appellee, that damages are claimed. No notice was given them to abate or discontinue the nuisance, if it was such. A person who comes into possession as grantee of land upon which is a nuisance, is not liable for merely permitting it to remain, until he has been notified or requested to remove it. *Groff v. Ankenbrandt*, 19 Ill. App. Rep. 148, and cases there cited; *Tenter v. T. St. L. & K. C. R. R. Co.*, 29 *Ibid.* 250; *Groff v. Ankenbrandt*, 124 Ill. 51. In the opinion in the latter case it is said, quoting the language in *Johnson v. Lewis*, 13 Conn.

303, "A plaintiff ought not to rest in silence and presently surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance." So in Angell on Water Courses, Perkins' 6th Ed., Sec. 403, it is said, where the party is not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought. Counsel for appellant contend, however, that appellees were purchasers *lis pendens*, and had adopted the acts of their predecessors, and therefore a formal notice and request to remove the nuisance was unnecessary. The court was justified in finding from the evidence that appellees did not continue the use of the tunnel but caused it to be stopped up and closed with a bulkhead, constructed in a substantial manner by Hamilton, a witness for appellant, thus evidencing a purpose to abandon its use and to refuse to adopt it as a way to enter and work the mines on their premises. Nor did George G. Mullins, grantee of the lessor, take or hold possession under said tenants, or step in their shoes. He testified he did not purchase the lease; that he waited two weeks on Johnson (then sole lessee) rather than buy the property, unless he would let his lease expire; that the day before he bought, Johnson told him he had surrendered the lease and would take employment as agent for him, said Mullins. We are of opinion also, that, under the facts proven, the doctrine of *lis pendens* has no application. The contention that it has, is based upon the fact that defendants bought and took possession of their premises while a suit was pending brought by appellant against said tenants.

This suit was trespass *quare clausum fregit* for breaking and entering and removing spar from plaintiff's close, adjoining the premises of appellees. Judgment against defendants was entered, which was paid; no damages were claimed or allowed for flooding of plaintiff's mine. Neither appellees, George G. Mullins, or his grantor, The Good Hope Company, were parties to that suit, nor are appellees privies in estate with said defendants. That being so, notwith-

East St. Louis Connecting Ry. Co. v. Craven.

standing the purchase was made during the pendency of said suit, they were not affected with notice. Entertaining the view before expressed, that there was sufficient evidence to warrant the court in finding defendants not guilty, and that plaintiff could not maintain his suit for the reason he failed to notify them and request the removal or discontinuance of the alleged nuisance, it follows that we hold the judgment should be and the same is affirmed.

East St. Louis Connecting Ry. Co. v. John Craven.

1. **NEGLIGENCE—Injuries Received While Not in the Exercise of Due Care.**—A car repairer who received an injury, and who at the time, was a mere intruder without right, and who, with no duty requiring him to do so, deliberately placed himself in a perilous position and neglected to exercise ordinary care for his personal safety, can not recover.

2. **NEGLIGENCE—Who Can Not Complain.**—Where the plaintiff is not in the exercise of a legal right, or in his relation of employe performing a duty imposed upon him, he must use great care before he can justly complain of the negligence of another.

3. **COMPARATIVE NEGLIGENCE—Contributory, Gross and Slight Negligence.**—One guilty of contributory negligence may recover if his negligence is slight, and the negligence of the other, as compared with his, is gross; yet it is an indispensable element that the party injured must have exercised ordinary care for his personal safety to justify a recovery.

4. **COMPARATIVE NEGLIGENCE—Application of the Rule.**—The rule of comparative negligence has no application, except in cases where the party injured has observed ordinary care for his personal safety.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1893, and reversed. Opinion filed March 23, 1894.

STATEMENT OF THE CASE.

Appellee recovered judgment against appellant for \$5,000 damages and costs, and the latter took this appeal. The action was in case to recover for personal injuries, alleged to

have resulted from the negligence of appellant's servants in running its engine at a reckless rate of speed, and failing to ring the bell thereon, as required by the ordinance of the City of East St. Louis. It is averred in the declaration that plaintiff was a car inspector in defendant's employ, and was not a fellow-servant with the men operating its engines and cars, at the time and place of injury. That while plaintiff was between the tracks on defendant's road, in the discharge of his duty, and exercising due care and diligence, he was struck by one of defendant's engines, so negligently run and operated as alleged, on one of said tracks, and was knocked under a car operated by defendant on the other of defendant's said tracks, and thereby his right leg was run over and crushed, amputation of it was necessitated, and other injuries to him resulted. Appellee was a car inspector in appellant's employ at the time he was injured, and had been so employed for six months. He was perfectly familiar with the location of the tracks and switches in appellant's yard where the accident occurred.

The road owned and operated by appellant, was a connecting or switching railroad in East St. Louis. Its business was to receive freight cars from, and deliver them to various lines having a terminus in that city. In its yard were two parallel tracks running north and south, with a "cut-off" or switch communicating from one to the other at a point about sixty feet north of the place of accident. These tracks were so near each other, that if an engine was upon one, and a freight car upon the other immediately opposite, a space of only two and a half to three feet between the two would be left. On the day appellee was injured, and but a short time before the accident, a car loaded with kegs of beer was received by appellant to be delivered to a line in East St. Louis. It had been derailed and damaged so that it became necessary to take it to appellant's repair track. Appellee marked the car "Shops, bad order," and picked up an iron casting, called a side bearing, which had fallen from the car, and carried the casting to engine "Five" then attached to the south end of the beer car,

supposing that engine would take it to the shops. But the engineer told him engine "One" would come and take the damaged car there. Instead of taking the casting to the engineer of the "One," as he might readily have done, appellee laid the casting in the space between the parallel tracks and went to his office. In a few minutes he returned to that place, and he testifies *he stooped over with his face toward the west*, in the act of picking up the casting, when the front beam of the engine "One," coming from the south on the east track struck him and knocked him between the trucks of the beer car, which was then being moved south on the west track by engine "Five," and the rear truck of that car ran over his right leg and crushed it, so that it became necessary to amputate it between the knee and ankle.

The special findings of the jury were, that plaintiff was in the line of his duty as car inspector when injured; that he was not then a fellow-servant with the persons in control of engine "One;" that defendant's servants did not injure plaintiff wantonly, willfully or on purpose; that the negligence of defendant which caused plaintiff's injury was "not giving proper signals;" that plaintiff could not have escaped the injury by the exercise of slight care and diligence.

CHARLES W. THOMAS, attorney for appellant.

A. R. TAYLOR, attorney for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

In our judgment the evidence introduced by, and on behalf of appellee, even if it had not been contradicted by the evidence for appellant, does not support some of the special findings or justify the general verdict.

Conceding it to be true, as claimed by appellee, that it was his duty as car inspector to pick up the side bearing and send it with the damaged car to the shops, yet after he had picked it up, he was not required by any rule or order,

or any duty he owed appellant as its servant, to drop it in the narrow space between the tracks, a place of danger, instead of taking it, as he ought to and might have done, to the engineer of the "One," the engine which he had been told would take that car to the shops, and no duty he owed appellant required him to go into the place where he had so negligently left the casting, and thereby subject himself to accident and injury. Hence, the jury were not warranted in finding that appellee was in the line of his duty as car inspector when injured. Nor did the evidence justify the finding "That appellee could not have escaped the injury by the exercise of slight care and diligence."

The jury very properly found that defendant's servants did not injure appellee wantonly, willfully or on purpose, and their general verdict is evidently based solely upon the finding that the negligence which caused the injury to appellee was "Not giving proper signals," by which language they doubtless meant no bell was rung, or whistle sounded on engine "One" as it approached the place where appellee was struck. Even if these signals were not given, it does not necessarily follow, when we take into consideration all the other facts and circumstances proven by the evidence for appellee, that because of such omission appellant became liable to respond in damages for the injury to appellee.

Engine "One" was standing not to exceed one hundred feet south of the place where appellee was struck, and he saw it there when he went between these parallel tracks up to that place. No signal was required to notify him that engine would presently pass the place where he left the casting and go up to the "cut-off," sixty feet north, in order to back down and take the damaged car.

These facts his own testimony shows he knew, and he also knew the space left between this engine going north on the east track, and the beer car on the west track, would be barely sufficient for a person to walk in with safety even in an erect position; yet it appears he entered that space to pick up the side bearing he had negligently put there and did not look back to see if engine "One" had started from

the place he had seen it standing, nor take any precaution to protect himself from being struck by the engine when it passed. On the contrary he turned with his face to the west and stooped over, thus affording a greater chance of being struck and injured. True, those on the engine saw him walking between the tracks where the space was sufficient for that purpose, but they had no reason to believe or anticipate that he would suddenly stop, and put himself in a posture where the front beam of the locomotive must necessarily strike him.

It appears to us from the evidence on behalf of appellee, that at the time of his injury he was a mere intruder, who without right, and with no duty requiring him to do so, deliberately placed himself in a perilous position, and utterly neglected to exercise the slightest care for his personal safety.

Where the plaintiff is not in the exercise of a legal right, or in his relation as employe performing a duty imposed upon him by the defendant, he himself must use great care before he can justly complain of the negligence of another.

In *I. C. R. R. Co. v. Godfrey*, 71 Ill., p. 498, a case where plaintiff was injured while walking between the tracks of defendant's railway, and there was space between the tracks for him to have walked without exposure to danger on either track, it is said he should have kept constant watch while he was traveling along, and that it was omission of duty and care in not so walking in the place where he was, as not to expose himself needlessly within striking distance of the engine, and it was held plaintiff could not recover because of his omission of duty, and want of care for his personal safety. See also, *I. C. R. R. Co. v. Hetherington*, 83 Ill., p. 515; *Lake Shore & M. S. R. R. Co. v. Hart*, 87 Ill. 535; *Barkley v. C. M. & St. P. Ry. Co.*, 37 App. Ct. Rep. 293.

While we hold, under the facts as proven on behalf of appellee, he could not recover, we recognize the law of this State, since the decision in the *Jacobs* case, 20 Ill. 478, to be, that one guilty of contributory negligence may recover if

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his negligence is slight, and the negligence of defendant as compared with his is gross; yet it is an indispensable element, that a party injured must have exercised ordinary care for his personal safety, to justify a recovery in a case like this, and it is well settled in this State, that this rule of comparative negligence has no application, except in cases where the party injured has observed ordinary care for his personal safety, and this the appellee failed to do.

The judgment of the Circuit Court is reversed.

FINDING OF FACTS.

The clerk is directed to insert in the final judgment order, that this court finds the following facts from the evidence: We find that appellee was not in the discharge of his duty as car inspector at the time he was struck and injured; that at the time he was struck and injured, he was not in the exercise of ordinary care for his personal safety, but negligently and carelessly placed himself in a perilous position and was struck and injured by reason of such want of reasonable care and by his own negligence, and that his injuries were not caused by the negligence of the servants of appellant.

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East St. Louis Connecting Ry. Co. v. Edward Shannon.

1. PLEADING—*One of Several Charges in Same Count Sustained by Evidence.*—If either of several charges of negligence contained in the same count of a declaration is sufficiently pleaded to show a cause of action, and is sustained by the evidence, a recovery may be had although the other charges are not proved.

2. PRACTICE—*Instructing Jury to Find for Defendant.*—Where there is any evidence tending to prove the charge, it is error to instruct the jury to find for the defendant.

3. FELLOW-SERVANTS—*A Recovery in Case of, etc.*—The law does not forbid a recovery in all cases where one is injured by the negligent act of a fellow-servant. If the master is guilty of negligence in employing the servant who causes the injury, or in retaining him in his service after notice of his incompetency, there may be a liability, notwithstanding the fact that the two are fellow-servants.

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4. RAILROAD COMPANIES—*Duty to Employ Careful Servants.*—Where the yards of a railroad company are specially dangerous, the company must exercise a corresponding degree of care in the selection of its foreman, and will be guilty of negligence, should it knowingly retain a man in that capacity whose fondness for the cup would be likely to endanger the lives or limbs of his associates.

5. RAILROAD COMPANY—*Drunken Servants.*—Where an accident is charged to the drunkenness of an engineer, if it appears that he was sober at the time of the injury and was managing his engine and crew without negligence, there will be no right of recovery on that ground.

6. INSTRUCTIONS.—In an action for personal injuries, an instruction which tells the jury that the plaintiff was not required, in the first instance, to know that the tracks were properly constructed, but had a right to rely on the implied undertaking of the company to make and keep them safe, and, if he was injured from the failure of the company to do so, the verdict should be in his favor, is erroneous, where there is evidence tending to show that the plaintiff at and prior to the time of his injury had actual knowledge of the fact that the tracks were not properly constructed. Given actual knowledge, there remains no room for the indulgence of presumption.

7. MASTER AND SERVANT—*Servant's Right to Presume Appliances are Safe.*—In case of personal injuries, if the injured party absolutely knew that the tracks were dangerously close to each other, he had, nevertheless, no right to shut his eyes and presume them to be safe, and then hold the company responsible for the consequences.

Memorandum.—Action for personal injuries. Error to the Alton City Court; the Hon. JAMES E. DUNNEGAN, Judge, presiding. Heard in this court at the February term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

Plaintiff's first and second instructions, assigned for error:

1. Should you find from the evidence in this case, that George Stevens was in the employment of defendant, and had charge of the engine which ran over plaintiff, and that said Stevens, while in the discharge of his duty as foreman of the engine for defendant, had been in the habit of becoming intoxicated to the extent of making it hazardous to the safety of plaintiff while working under him, and that defendant knew that said Stevens was in the habit of discharging his duties when he was in a condition unfit to do so, and if they further believe that the injury complained of in this case was the result of said Stevens' intemperance, then in that event, your verdict should be for the plaintiff.

2. The court instructs the jury for the plaintiff, that he was not required in the first instance to know if defendant's tracks and switches were properly constructed, and that plaintiff had the right to rely upon the implied undertaking of his employers, that they had been properly constructed and were suitable and safe for the passage of trains and cars thereover, and that his superiors were exercising some diligence to keep

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them safe and in proper repair and condition; and if from its failure to do so the injury complained of in the declaration occurred, the defendant is liable and your verdict should be for the plaintiff.

The statement of facts is contained in the opinion of the court.

CHARLES W. THOMAS, attorney for plaintiff in error.

A. R. TAYLOR and WM. P. LAUNTZ, attorneys for defendant in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Edward Shannon sued the East St. Louis Connecting Railway Company in the City Court of East St. Louis for injuries received by him while engaged in coupling cars in the railway company's yards.

The company petitioned for a change of venue, and the venue was changed to the Alton City Court. Thereupon the company appeared in the latter court, and moved that the cause be remanded to the City Court of East St. Louis. The action of the Alton City Court in overruling this motion is now assigned for error. For an argument of the question, we are referred to the brief of plaintiff in error in East St. Louis Connecting Railway Company v. Enright, decided at the present term of this court. For our views of the law on the question of jurisdiction, we would, in turn, refer to the opinion filed in that case, in which we hold that the motion to remand the cause was properly overruled.

The declaration in this case contains one count with three distinct charges of negligence, which are substantially as follows: First, that the railway company negligently maintained its tracks so close together at the place where the injury was received as to jeopardize the lives and limbs of switchmen while in the discharge of their duty. Second, that George Stevens, who had control of the engine which ran over and injured the defendant in error, was incompetent to control and manage the same, because of his reckless

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and careless habits, and because of his frequent indulgence in the use of intoxicating drinks, of which incompetency the railroad company had notice before the time of the injury. Third, that the engine which inflicted the injury was being propelled at a much greater rate of speed than ten miles an hour, in violation of the statutes of the State of Illinois and of section 583 of the revised ordinances of the city of East St. Louis.

The declaration further alleges that Shannon received his injuries while in the discharge of his duties as a switchman for the company, and while he was exercising all due care and diligence on his part.

Plaintiff in error did not demur, but pleaded the general issue to this declaration. After verdict in Shannon's favor, motions for a new trial and in arrest of judgment were interposed by the company, and the overruling of these motions is assigned for error.

It is urged that the motion in arrest should have been sustained because the declaration states no cause of action. It is also insisted that the court erred in not instructing the jury, at the request of plaintiff in error, to find a verdict of not guilty.

The law is, that if either of several charges of negligence contained in the same count of a declaration is sufficiently pleaded to show a cause of action, and is sustained by the evidence, a recovery may be had, although the other charges are not proved. *Weber Wagon Co. v. Kehl*, 139 Ill. 644. Without examining the objections to the three charges of negligence, it is sufficient to state that the second charge, at least, was sufficiently pleaded. It is also true that there was sufficient evidence tending to prove this charge, to justify the court in refusing to instruct the jury to find for the plaintiff in error.

The principal objection to the second charge of negligence as pleaded, is, that it does not allege that Shannon and Stevens were not fellow-servants. But the law does not forbid a recovery in all cases where one is injured by the negligent act of a fellow-servant. If the master is guilty

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of negligence in employing a servant who causes the injury, or in retaining him in his service after notice of his incompetency, there may be a liability, notwithstanding the fact that the two servants are fellow-servants. The Joliet Steel Co. v. Shields, 134 Ill. 209. Inasmuch as the charge here is that the railway company retained an incompetent man in its service, after notice of his incompetency, no averment that such servant and the injured person were not fellow-servants, would seem to be necessary.

In justification of the refusal of the court to instruct the jury to find for the plaintiff in error, it may be necessary to give an outline of the facts as they appear from the record.

The evidence shows that Shannon was one of a "crew" engaged in switching cars in the company's yards. The members of this "crew" were the foreman, George Stevens, the engineer, Edward J. Keiflein, the fireman, Benjamin A. Godfrey, and three switchmen, one of whom was the defendant in error.

The foreman had control of the other members of the "crew," and directed the movements of the engine by signals to the engineer. At the place where the injury was received there was a track called the "lead" track, and distant from it about thirteen feet from center to center, leaving a space of eight feet between the inside rails of the two tracks there was a sidetrack, known as the L. & E. track. At eight or nine o'clock on Sunday morning, April 19, 1891, certain cars were standing on the latter track, about seven car-lengths from the junction of the two tracks, and Shannon, with the knowledge of the foreman, was standing near these cars for the purpose of making a coupling with the car which was about to be "kicked" down the track.

Thereupon the engine "kicked" the car through the switch down the L. & E. track, and then, as soon as the switch was turned, ran down the "lead" track at a rate of speed variously estimated at from five or six to twelve or fifteen miles an hour. Shannon sought to couple the cars, and as they came together jumped back to avoid injury from the collision.

He was struck by the foot-board of the passing engine and thrown forward between the rails. Neither the engineer nor the fireman saw him, or knew of what had happened, till the foreman, who was on the foot-board, and knew that Shannon was to make the coupling and saw the jump and the collision, gave the engineer the signal to "stop short." When the engine stopped Shannon was under the tank, having been dragged several feet from the place where he struck the track. His injuries were caused chiefly by the ash-pan, and were so serious that he was confined to the hospital for more than two months.

The evidence tends to show that Stevens drank liquor occasionally; that he had been drunk more than once about a year before the accident; that in March before the accident, the general yard-master of the company refused to permit him to go to work because he "looked like he had been drinking the night previous;" and that according to the testimony of Shannon, the foreman was "pretty well filled up" with what smelled like whisky at the time when Shannon was injured. Stevens testifies that he did not drink liquor after election on April 7th. It appears from the evidence, that the work of switchmen in these lower yards was exceedingly hazardous, so much so that the yards were sometimes called the "battle-field." This being true, the company was required to exercise a corresponding degree of care in the selection of its foreman, and would be guilty of negligence, should it knowingly retain a man in that capacity whose fondness for the cup would be likely to endanger the lives or limbs of his associates. It was the business of the yard-master to hire and discharge engine crews, and his knowledge was the knowledge of his principal.

We refrain from passing upon the weight of the evidence concerning Stevens' alleged incompetency, or the company's notice thereof, or Shannon's knowledge of the same fact. We have sought to show no more than that there was some evidence on the trial tending to show a cause of action under the second charge of negligence, and that therefore, the motion to find for plaintiff in error was properly overruled.

We think, however, that there was such error in the giving of defendant in error's first and second instructions as to require a reversal of the judgment.

The first instruction, which is based upon the second charge of negligence, makes the liability of the company to depend upon Stevens' habit of becoming intoxicated, and of discharging his duties when in a "condition unfit to do so," when the record wholly fails to show either that he was in the *habit* of becoming intoxicated, or in the *habit* of discharging his duties when in an unfit condition. The instruction is also erroneous in leading the mind to the conclusion that if Stevens had been in the habit of becoming intoxicated prior to the time of the accident, and the company was chargeable with knowledge of the fact, Shannon would have the right to recover; whereas, conceding these to be the facts, yet if it was also true that Stevens was sober at the time of the injury, and was managing his engine and crew without negligence, there would be no right of recovery whatever. Besides, if Stevens was intoxicated on the day of the injury, and the language of the instruction can be so construed as to include that fact, then the instruction would be erroneous in making no reference to Shannon's negligence in working under an intoxicated foreman with knowledge of his intoxication.

The second instruction told the jury that Shannon was not required, in the first instance, to know that the tracks were properly constructed, but had a right to rely on the implied undertaking of the company to make and keep them safe, and that if he was injured from the failure of the company to do this, the verdict should be in his favor. According to this instruction, if Shannon absolutely knew that the tracks were dangerously close to each other, he had, nevertheless, the right to shut his eyes, presume them to be safe, and then hold the company responsible for the consequences.

This is not the law. Given actual knowledge, there remains no room for the indulgence of presumption. An uninformed switchman, having had no opportunity to learn

the condition of the tracks, could lawfully presume that the tracks were properly laid, and were maintained in a safe condition. Such, however, was not the defendant in error, who had been working at this locality for two months, and must have had actual knowledge that the tracks were not more than eight feet apart.

We do not deem it necessary to notice other points suggested in the argument.

For the errors indicated, the judgment is reversed, and the cause is remanded for proceedings in conformity with the views herein expressed.

City of Mt. Carmel v. Robert Bell.

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1. CITIES AND VILLAGES—*Vacation of Streets, etc.*—An ordinance vacating a strip of ground on the side of a street and donating it to the adjacent property owners is invalid, and an ordinance authorizing the building of a sidewalk six feet wide on the side of the street, should be construed to mean that the walk is to be built along the original line of the streets and not along the new line sought to be established by the first named ordinance.

2. SHADE TREES—*Not to be Cut Down Unless, etc.*—Where a sidewalk of the width established by an ordinance can be built along the original line of the street without the sacrifice of shade trees, the city has no right to cut them down.

Memorandum.—Bill for an injunction to restrain the cutting down of shade trees. Appeal from the Circuit Court of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1893, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

M. F. HOSKINSON, attorney for appellant.

APPELLEE'S BRIEF, BELL & CONGER, ATTORNEYS.

The right of owners of lots abutting streets, to plant and protect shade trees, has been recognized by municipal

authorities and courts, until the custom is badged with the authority of unwritten law. Cities should endeavor to foster and preserve trees planted on its streets. *Baker v. Town of Normal*, 81 Ill. 108.

MR. JUSTICE SCOFFIELD DELIVERED THE OPINION OF THE COURT.

Five valuable shade trees in front of appellee's property on Pear street, in the city of Mt. Carmel, were about to be cut down by the city authorities to make room for a sidewalk to be built adjacent to, and abutting upon, a line determined by the vacation of the east two feet of the street where it touches appellee's property. The destruction of these trees, which would have been an irreparable injury to the property in question, was perpetually enjoined by the court below. In *The City of Mt. Carmel v. Mary L. Shaw et al.*, decided at the present term of this court, in which the questions of law and fact presented are substantially the same as in the record now before us, it has been held that the ordinance relating to the vacation of a strip of ground on the side of Pear and other streets is invalid in so far as it seeks to vacate and give to property owners a part of such street, and that the ordinance authorizing the building of a sidewalk six feet wide on the side of these streets should be construed to mean that the walk is to be built along the original line of the streets and not along the new line sought to be established by the first named ordinance. We refer to the opinion in the Shaw case for a full exposition of our views of the law on this subject.

According to the testimony of appellant's witnesses, a sidewalk six feet in width can be built along the original line of the street in front of appellee's property without the sacrifice of any of appellee's shade trees.

This being true the city has no right to cut them down.

The decree will be modified so that the injunction may remain in force as long as there is no public necessity for a sidewalk along the property of a greater width than six feet.

. With this modification the decree will be affirmed.

City of Mt. Carmel v. Maria L. Shaw and James I. Shaw.

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1. CITIES AND VILLAGES—*“Woodman Spare That Tree.”*—A city has no plenary power to cut down shade trees and remove them simply because they are in the street. Shade trees standing just within the curbing of a sidewalk in a street do not constitute a nuisance and the city may be enjoined from destroying them.

2. TREES—*Policy of the State to Protect.*—The State has adopted a policy encouraging the growth of trees and discouraging their wanton destruction. The taste and comfort of the people demand that this policy should be enforced.

3. TREES—*Power of Public Officers.*—The determination of the public officers that trees in a street be destroyed is not so far a judicial act as not to be subject to review by the court. Such officers are not supreme but must act in the interests of the public and in accordance with the spirit of the laws of the State.

4. TREES—*Right to Stand by Prescription.*—The fact that trees have been permitted to stand for more than twenty years raises the presumption that they were planted under lawful authority.

5. SHADE TREES—*City May Remove, When.*—When a shade tree in the business part of a city becomes an obstruction to travel or business, it may be removed by the municipal authorities as the public interests require.

6. MUNICIPAL CORPORATIONS—*Extent of Corporate Powers.*—Municipal corporations only have such powers as are conferred upon them expressly or by necessary implication.

7. MUNICIPAL CORPORATIONS—*Mode of Expressing Powers Not Prescribed.*—If the mode of exercise of the power conferred upon a city or village is prescribed that mode must be followed.

8. MUNICIPAL CORPORATIONS—*Mode of Exercising Powers Not Prescribed.*—Where the mode of the exercise of the power is not prescribed by the charter, but is left discretionary with the corporate officials, the mode determined upon, if unreasonable or oppressive, will be held invalid.

9. CITIES AND VILLAGES—*Donating Streets, etc.—Ultra Vires.*—An ordinance donating and vacating “a strip two feet wide next to the property lands, lot or lots abutting on a street,” is an exercise of power by the city not authorized, and therefore void.

10. CITIES AND VILLAGES—*Power to Vacate Streets.*—Whether a city is invested with the fee in the streets or an easement, a trust is imposed for the use of the public. The power to vacate does not include the power to vacate only a portion, but all of the street, when it is determined that the street, as such, is no longer required for public use.

11. ORDINANCES—*Part Valid and Part Invalid.*—One section of an ordinance may be valid and another section invalid. An ordinance

going beyond the power of the corporation may be held valid so far as the power lawfully extends and *ultra vires* as to the residue.

Memorandum.—Bill for injunction. Appeal from the Circuit Court of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1898, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, M. F. HOSKINSON, ATTORNEY.

The defendant has, under our statute, full control of the streets of the city, and has the right in its discretion to make sidewalks in any way and manner and at such location as it deems best, and courts will not inquire as to whether the location of an improvement being made by the city in good faith is the best or not. *Roberts v. City of Chicago*, 26 Ill. 249.

A city incorporated under the general law has a large discretion as to opening, grading and repairing of streets and sidewalks in respect to the time, manner and cost of the same, in the exercise of which it will not be controlled by the courts, unless there is great abuse operating upon individuals. *Brush v. City of Carbondale*, 78 Ill. 74.

The bill alleges that the trees are in front of the lot. Then the city has sole control over the trees, and the complainants have no right in the trees or to them only in common with other citizens, but no title or authority over them as against the public. *Baker v. The Town of Normal*, 81 Ill. 108.

A city is not liable for errors of judgment in making its streets and sidewalks fit for public use, or made liable for the inconvenience and expense of adjusting adjacent property to the grade of the street as changed. *Shawneetown v. Mason*, 82 Ill. 337; *Village of Hyde Park v. Dunham*, 85 Ill. 569.

APPELLEES' BRIEF, MUNDY & ORGAN, ATTORNEYS.

In this case the title to the streets is in the property owners, the plat of the city having been acknowledged by attor-

City of Mt. Carmel v. Shaw.

ney in fact. *Thomsen v. McCormick*, 136 Ill. 135; *Earll v. City of Chicago*, 136 Ill. 277.

Therefore the power of the city is limited.

Individuals may invoke a court of equity in cases of this sort. *C. & V. R. R. Co. v. The People*, 92 Ill. 170; *The People ex rel. Farrington v. Whitcomb*, 55 Ill. 172.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellees were the owners and in possession of lot 329, situated on the north side of Sixth street, in the city of Mt. Carmel, Illinois, near the center in width of which is located their large dwelling house, in which they have resided for about thirty years. On each side of the front of their house, in the street, are two large maple trees, about forty feet in height and two in diameter, with ample branches, which afford very desirable shade to the house and lot in summer, protection against dust and shelter against storms. They were planted about the year 1857, and the nearest is situated six feet from the south line of Appellee's lot on north line of Sixth street, as the city was originally platted, as shown by an amended plat of date October 15, 1822, signed by the attorney in fact of the proprietors, which, as conceded by counsel, makes the dedication at common law. The sidewalks heretofore constructed were always placed between said lot and trees, to which no one made objection, as the trees supplied a pleasant shade for pedestrians, under which, in the heat of summer, they often paused to cool and refresh themselves.

In July, 1891, the city council passed "an ordinance in relation to lawns and sidewalks, and narrowing or cutting down the width of streets, and donating certain portions of ground to the property holders."

By Sec. 4, it was provided "that a strip two feet wide next to the property, lands, lot or lots, abutting on said streets shall be, and is hereby vacated, donated and given to and shall be a part of said lands, lot or lots."

Sec. 5. "That six feet * * * next to the property, lands, lot or lots, on both sides of said streets, shall be set

apart upon which to build sidewalks." It recognized the streets as being ninety-nine feet in width.

The ordinance further provided for a survey to be made in accordance with its provisions, which was done, and a plat made which was approved by the council. The surveyor testified: "I stuck stakes along Sixth street inside the line next the street for the proposed side walk. I placed the stakes eight feet from where I found the original line on Sixth street. I intended to leave two feet north of the six-foot sidewalk. If built that way, it would be vacating two feet between the line of the fence and the sidewalk.

On July 25, 1892, the city council passed an ordinance requiring that the owners of lots should construct a brick sidewalk six feet in width, on the north side of Sixth street, and thereby relieve their property from special taxation. "Said sidewalk shall be made and constructed along the *outside line of said street and adjoining the property, lands, lot or lots, abutting on said street.*" There is no other direction in the ordinance as to the location of the sidewalk.

The city, in constructing the sidewalk under said ordinance, recognized the outside line of Sixth street as the one established by the surveyor, under the ordinance passed in July, 1891, whereby two feet off each side of the street was donated to the adjoining lot owners, thereby extending it into the street, so as to include the larger part of the body of said trees, which the city officials proposed to cut down as being in the way of said improvement. Thereupon the appellees filed their bill in chancery, alleging the facts substantially as above set forth, except there was no specific reference to the ordinances; averring there was no public or other necessity for the destruction of the valuable shade trees; that there was sufficient room between appellee's south line, or north line of the ninety-nine foot street, and the trees, to build said walk without damage to said trees; that to destroy them would result in irreparable damages to the owners of the lots, as well as injury to the public, and prayed for and obtained a writ of injunction.

The answer admits the substantial facts set up in the bill but denies the conclusions reached, that there was no neces-

sity for destroying the trees, or that such destruction would occasion irreparable damages; avers the passage of the ordinance of 1892, and that the outside line of said walk would bring from one-half two two-thirds of the diameter of said trees within it and hence the necessity for their removal, which it is affirmed the city has a right, in its discretion, to do. Issue was joined, and hearing had, upon which a decree was entered in favor of appellees, by which it was ordered and adjudged by the court "that the defendant, the City of Mt. Carmel, Illinois, be forever and perpetually restrained from cutting, digging away or from destroying or interfering with said shade trees * * * excepting within six feet of the true south line of said lot 329," whereupon the city took this appeal and asks a reversal on the broad ground that as the trees are in the street it has the plenary power to cut them down and remove them in its discretion, the exercise of which discretion, in the absence of bad faith, is not subject to review by the courts.

Three questions may be said to arise in regard to the exercise of power by such a corporation as appellant. 1. Is such exercise of power impliedly or expressly authorized by a grant? 2. Is it in pursuance of or in accordance with the method prescribed? 3. Is the mode of exercise reasonable where there are no limitations?

The courts have the right to make these inquiries and it is their duty to apply these tests as occasion demands; for such corporations only have such powers as are conferred expressly or by necessary implication. *Petersburg v. Maffin*, 14 Ill. 193; *Low v. People*, 87 Ill. 385. And their acts beyond such powers are void. *Agnew v. Brall*, 124 Ill. 312.

If the mode of exercise of the power is prescribed, that mode must be followed. *Gaddis v. Richland County*, 92 Ill. 119.

Where the mode of exercise of the power is not prescribed by the charter but is left discretionary with the corporate officials, the mode determined upon, if unreasonable or oppressive, will be held invalid. *Brush v. City of Carbondale*, 78 Ill. 74; *Lakeview v. Tate*, 130 Ill. 247.

Applying these tests to the acts of appellant, the law determines that Sec. 4 of the ordinance of July, 1891, donating and vacating "a strip two feet wide next to the property, lands, lot or lots, abutting on said street" —Sixth street— was an exercise of power by the city not authorized, and therefore void. Whether the city was invested with the fee in the streets or an easement, a trust was imposed for the use of the public. The power to vacate does not include the power to vacate only a portion but all of the street, when it is determined that the street as such is no longer required for such use. *Smith v. McDowell*, No. 2, Vol. 35 N. E. Rep. p. 141.

With Sec. 4 of said ordinance eliminated, Sec. 2, which is a valid provision, requires that six feet next to the lots on Sixth street shall be set apart upon which to build sidewalks. This section may stand, though the other section is invalid.

An ordinance going beyond the power of the corporation may be held valid so far as the power extends, and *ultra vires* as to the residue. *Kittering v. Jacksonville*, 50 Ill. 39; *Harbaugh v. Monmouth*, 74 Ill. 367; *Poyer v. Village of Des Plaines*, 123 Ill. 111; *Wilbur v. City of Springfield*, *Ibid.* 395.

Therefore, under the provisions of said ordinance of 1891, the city was required to utilize the six feet next to appellees' lot for the location of the sidewalk.

The ordinance of 1892, under which the sidewalk in question was required to be constructed by appellees, also provided that "said sidewalk shall be made along the outside line of said street and adjoining the lots abutting on said street." Clearly, then, the city, in attempting to locate said sidewalk two feet from the outside line of said street, was violating the valid part of its own law. It is clearly proven that the sidewalk can be constructed between such outside line and said trees, in which case to destroy trees of such age, dimensions, beauty and utility as these are shown to be, would be intolerably wanton and oppressive. The planting and cultivation of trees are encouraged by the State

and Nation. City and village authorities are expressly empowered to plant trees upon the streets. Art. 5, Sec. 1, Cl. 8 of Chap. 24, p. 463, Starr & C. Township authorities are authorized to offer premiums and to take such action as shall induce the planting and cultivation of trees along highways in such towns, and to protect and preserve trees standing along or on highways. Art. 4, Sec. 1, Cl. 6, Chap. 139, Starr & C., p. 2412. By the act of 1887, Vol. 3, Starr & C., p. 56, it is made the duty of the governor of the State "annually in the spring, to designate by official proclamation, a day to be designated as 'Arbor Day,' to be observed throughout the State as a day for planting trees, shrubs and vines about the homes and along the highways and about public grounds within the State, thus contributing to the wealth, comforts and attractions of our State." These laws represent the deep sentiment and spirit of the people and declare a fixed public policy, which public officials must recognize and observe.

Trees are especially adapted to beautify and adorn the streets of the residence portion of a city, and very materially contribute to the enhancement of the value of such property, as well as to the health, comfort, pleasure and good taste of the inhabitants. To wantonly destroy a noble tree, especially if planted by the hand of man for a useful purpose, which for long years it has served, shocks a tender sentiment in our natures, well represented and expressed in that familiar song of "Woodman, Spare That Tree."

The fee in the street adjacent to lot 329 is in the appellees, as is conceded by counsel. Whether it is or not, the appellees have an interest in the preservation of these trees, as the owners of property and as residents of the city. Shade trees standing just within the curbing of a sidewalk in a street do not constitute a nuisance, and the city may be enjoined from destroying them. *Bills v. Belknap*, 36 Iowa, 583; *Patterson v. Vail*, 43 Iowa, 142. In the *Bills* case it is said by Chief Justice Beck, "The State has adopted a policy encouraging the growth of trees and discouraging their wanton destruction. The tastes and comfort of the people

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demand that this policy should be enforced, and we confess that we have no sympathy with that spirit of vandalism which would unnecessarily remove the ornaments of the country, whether they were erected by the hand of industry or are the bounteous production of nature." He further declares that the determination of the public officers that the trees should be destroyed is not so far judicial that it is not subject to review by the courts. That such officers are not supreme, but must act in the interest of the public and in accordance with the spirit of the laws of the State.

There is no proof in this case that the trees in controversy were planted by authority, but as is said in the case of Bliss v. Ball, 99 Mass. 597, the fact that they have been permitted to stand for more than twenty years, raises the presumption that they were planted under lawful authority.

While the decree of the court enjoining the city from destroying the trees will be affirmed, it will have to be modified. The injunction is perpetual. Conditions may so change, that in time public interest may require that the sidewalk should be much wider than six feet; should this property by the growth of the city become a business part, then a sidewalk might be required of twelve feet in width. In such case the trees would be an obstruction to travel, and the city would have a right to remove them when they became so. This time may never come; yet we are not disposed to interfere with the lawful exercise of power on the part of the city, should the occasion ever arrive. The decree will therefore be modified so that the injunction shall remain in force so long as there is no public necessity for a sidewalk along lot 329, in excess of the width of six feet. With this modification the decree will be affirmed.

**City of East St. Louis v. The Illinois and St. Louis
Bridge Company et al.**

1. **EQUITABLE LIENS—When They Do Not Exist.**—The City of East St. Louis, by an ordinance, granted to the Illinois & St. Louis Bridge Company the right of constructing an approach to a bridge, with its roadways

over a street and the streets and alleys crossing the same, upon the condition that the company should file with the city a bond in the sum of \$30,000, for the payment of all damages for which the city might become responsible to owners of real property adjacent to said street, by reason of the passage of said ordinance and construction of said approach. The company having become insolvent, its property was sold under a decree of foreclosure to the St. Louis Bridge Company. The city having become liable to pay judgments to certain owners of real estate for damages sustained by reason of the premises, instituted proceedings against the purchasers of the sale to enforce payment of the amounts under the condition of the bond. *It was held*, that there was no equitable lien upon the corporate property which attached to the property when sold under the decree of the Federal Court; that the present owners and other persons holding possessory rights and interests therein, stand in the shoes of the purchaser at the sale, and take the property subject to no equitable liens under the terms of the ordinance.

Memorandum.—In chancery. Appeal from the Circuit Court of St. Clair County; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1898, and affirmed: Opinion filed March 28, 1894.

STATEMENT OF THE CASE.

On May 20, 1886, the city of East St. Louis filed its bill in the court below against the Illinois and St. Louis Bridge Co., The St. Louis Bridge Co., The St. Louis, Iron Mountain & Southern Ry. Co., The Wabash, St. Louis & Pacific Ry. Co., and the Missouri Pacific Ry. Co., alleging that the Illinois and St. Louis Bridge Co., a corporation duly incorporated in the State of Illinois by a public act of the General Assembly, in force February 21, 1867, having in pursuance of Sec. 8 of said act, consolidated its property and franchises with those of the Illinois and St. Louis Bridge Co., a corporation of Missouri, duly incorporated in that State, the consolidated company bearing the name of "*The Illinois and St. Louis Bridge Company*," and being a corporation of both States, having the same powers and exercising the same franchises in each, and that prior to 1873, in pursuance of said powers it proceeded to construct a bridge across the Mississippi river from East St. Louis to the city of St. Louis. That in order to construct said bridge, it became necessary to take and permanently appropriate and use a part of Crooks street, in

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East St. Louis, and build the approaches to the bridge thereon. That said city at the request of said company, did, on February 25, 1873, pass ordinance No. 211, entitled, "An ordinance to allow the Illinois and St. Louis Bridge Company to erect the superstructure of the eastern approach of said bridge over Crooks street and other streets upon certain conditions." Which ordinance sets out as a preamble that "Whereas the Illinois and St. Louis Bridge Company desire to be allowed to raise the superstructure of their approaches to the bridge over Crooks street and the cross streets and alleys intersecting said Crooks street from the west line of Front street to the east line of Fourth street, and are willing to procure thirty feet of land on the south side of Crooks street, and dedicate the same for the purpose of widening Crooks street, so that it will be eighty feet in width, in consideration of the right and privilege to raise and use such superstructure. And the said city of East St. Louis is willing to grant such right and privileges upon said consideration." Sec. 1 of said ordinance provides, that in consideration of the acquisition and dedication by the Illinois and St. Louis Bridge Company, of the thirty feet of land as described in the preamble, and when such dedication is so made, the city doth grant to said company the right and privilege of constructing said eastern approach of and to said bridge, with its roadways over said Crooks street, cross streets and alleys, so that the same be constructed in such a manner as to have sufficient perpendicular space above said cross streets for all practicable purposes of passage thereon.

Sec. 2 authorizes the construction and use of a return way. Sec. 3 authorizes the crossing of Dyke avenue, and other public streets upon certain conditions. Sec. 4 authorizes the temporary use of certain streets for building material, upon condition that the company will pay all judgments recovered against the city for any abuse of the privileges granted by this section. Section 5 requires said company to file with city clerk, the deed dedicating the land for widening Crooks street, and an explanatory plat which

shall be certified to in writing by the city engineer and city attorney. Section 6 requires the company to file with the city clerk a bond binding said company in the sum of \$60,000 for the payment of any and all damages which may accrue and for which the city may become responsible to owners of real property adjacent to Crooks street, by reason of the passage and enforcement of this ordinance, such bond to be made payable to the city of East St. Louis for the use of persons thus damaged, and shall be recorded in the journal of the city council, on the day of the date of its filing. Section 7 provides the ordinance shall be operative whenever said dedication is made, and said bond is filed as aforesaid, and not before, and that all rights conferred by the ordinance shall be dependent upon the efficiency of the bond, to the effect that if any judgment obtained thereunder against said bridge company shall from any cause remain unsatisfied for the space of ninety days from and after final adjudication, all such rights shall cease as if never granted.

It is next alleged in the bill that complainant, being then the fee simple owner of the streets named, in and by said ordinance, and upon the conditions contained therein, granted said company the right and privilege of constructing the eastern approach of said bridge, with its roadways over said Crooks street, and streets and alleys crossing the same. Alleges that one of said conditions precedent was the filing of the bond in the sum of \$60,000, conditioned as required by said ordinance. That said bond, signed by said company only, was duly filed and accepted by complainant, July 1, 1873, and the other conditions precedent named in said ordinance were complied with by the company and the ordinance went into effect. Alleges the provision of said 7th section of said ordinance; alleges that various persons owning property adjacent to Crooks street, being damaged by reason of the passage and enforcement of the ordinance, and the building, maintaining and operating of the said bridge, brought suit against complainant and recovered judgments in the City Court of East St. Louis and

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refers to a list thereof marked exhibit "C" and made part of the bill. That complainant has paid the judgment in said list named, recovered by John M. Sullivan, amounting, with interest and costs, to \$3,465.70, and is liable to pay all the other judgments in said list. That all of the property, franchises and privileges of the "Illinois and St. Louis Bridge Co." were mortgaged to secure certain of its bonds and were duly sold on December 20, 1878, under a decree of the United States Circuit Court for the Eastern District of Missouri, and by various conveyances have passed into the hands of the "St. Louis Bridge Co.," a corporation of Missouri, which now owns the same.

That since said date the "Illinois and St. Louis Bridge Co." has been wholly insolvent, and any suit upon said bond would have been wholly unavailing. That since that date, the Missouri Pacific Railroad Co., a corporation of Missouri, the St. Louis, Iron Mountain & Southern Ry. Co., and the St. Louis, Wabash & Pacific Ry. Co. have acquired some possessory rights in said bridge and the property pertaining thereto, and have some interest therein, and said St. Louis Bridge Co. and said three corporations are now using said Crooks street, and streets and alleys crossing it, as the same were originally appropriated under said ordinance, for maintaining and operating a portion of said bridge therein, and refuse to pay complainant said judgments. Prays that upon the hearing, the court will enjoin defendants and each of them from maintaining or operating in said Crooks street any portion of said bridge or its approaches, until the amount of said judgments, with interest and costs, is paid to complainant. That the court will decree that said judgments, interest and costs be paid by defendants, or some of them, to complainant within a short day; and in default thereof that the said bridge structure, with its approaches, in this State, may be sold to satisfy the amount of the liability of complainant, on account of said judgments. Prayer for general relief. To this bill a general demurrer was interposed by the defendants on November 30, 1886, and on the 24th day of March, 1887, the demurrer was sustained, and

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complainant electing to stand by its bill, the same was dismissed by the court, and an order entered that defendants recover of complainant their costs. Whereupon complainant then and there craved and was allowed an appeal to this court. No appeal having been perfected, complainant sued out this writ of error March 23, 1892.

CHARLES W. THOMAS, attorney for plaintiff in error.

G. & G. A. KOERNER, attorneys for all defendants in error except Illinois and St. Louis Bridge Co.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

It is quite apparent from the foregoing statement that complainant's bill is defective, in substance, and if the material allegations therein are true, they furnish no sufficient equitable grounds for granting any of the relief prayed for. Counsel for plaintiff in error claim, however, in the printed brief, that the bill is good on two grounds, viz.: Because it is the right of a property owner to enjoin the use of his property by a corporation which is exceeding its powers and has not paid for the privilege; and because a city has the right to enjoin the unauthorized use of its streets. Granting both these propositions to be correct, the applicability thereof under the facts alleged is not perceived by us. The city was and is the sole owner of Crooks street, over and along which the consolidated bridge company was granted the right to construct, use, maintain and operate the eastern approach and roadways of its bridge. The grant was perfected by the company giving the city the consideration required by the first section of said ordinance, and performing all the conditions precedent to the exercise of such right as therein provided, all of which, as admitted in the bill, was so done and performed; and thereupon the company by virtue of the power and authority so lawfully conferred upon it by the city, and after expending the large amount of money required to build the bridge, approach and roadways, entered into the use and enjoyment of the right so granted,

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as it lawfully might. It thus appears the company did not exceed its powers, that it did pay for the privilege granted, and whatever it did was not unauthorized, but was done by the express authority of the city. Hence, the city had no right to the injunction upon either of the two grounds mentioned. But we apprehend the real and only ground relied on by counsel for plaintiff in error to maintain the bill is, that the consolidated bridge company was bound by the terms of sections 6 and 7 of said ordinance, to pay the judgments referred to in the bill, which were recovered against the city; that an equitable lien upon the corporate property was thereby created, which attached to the property when sold under the decree of the Federal Court, and the present owner thereof, and the other defendants holding possessory rights and an interest therein, stand in the shoes of the purchaser at said sale, and took the property subject to the terms of said sections of the ordinance and subject to such equitable lien. This contention is not tenable. It is not alleged in the bill that said judgments were entered before the execution of the mortgage foreclosed in the Federal Court, nor is the date of its execution stated.

It is not alleged that the sale under said decree was a conditional sale, and by the terms thereof, the purchaser assumed the liabilities of the consolidated bridge company. Nor is it denied that said sale was absolute and unconditional. There is nothing alleged in the bill to show that the purchaser at the sale took the property subject to any liabilities of the mortgager, or to any conditions of said ordinance. Upon the showing made, he purchased the property free from any equitable, or other lien, and the St. Louis Bridge Company own the property, unincumbered by any lien or liabilities. It is said in the opinion in *People v. L. & N. R. R. Co.*, 120 Ill. 49, the contract of a railway company to perform certain conditions in consideration of a donation or subscription to its aid, made by a county, is merely a personal undertaking, and is not in the nature of a covenant running with the land, and a purchaser of such company's road and property is under no personal

obligation to perform such contract. It is also said in the same opinion, so a railway company which succeeds to the ownership and franchises of another company, by purchase under a decree of foreclosure against it and its lessee, will owe no duty to the county not imposed by law, and will take the road and its property absolutely discharged from the contract between the county and the original railway company. The same doctrine is announced in *Morgan Company v. Thomas*, 76 Ill. 120. We hold, therefore, that neither the Illinois Bridge Company, nor its co-defendants, the three corporations named in the bill, are liable in law or equity, to pay said judgments, and that it would have been inequitable and unjust to grant an injunction for the purpose of coercing the payment thereof by said defendants. They were in nowise bound or affected by the personal obligation of the consolidated company, evidenced by its bond given in accordance with the provisions of section 6 and section 7 of the ordinance. The city contracted to take that bond as its sole security against loss in case it became liable for damages to the owners of real property adjacent to Crooks street by reason of the passage and enforcement of the ordinance, and is bound by its contract. The bond was payable to the city for the use of persons thus damaged, and contained the condition that, if any judgment obtained thereunder against said bridge company should be unsatisfied for the space of ninety days after final adjudication, all rights conferred by the ordinance "shall cease, as if never granted."

No suit was brought upon the bond and no such judgment was obtained; hence no rights conferred by said ordinance were forfeited, and the remedy to recover from the consolidated company the damages to the owners of said real property was at law, and no reason for granting any of the equitable relief prayed for as against that company, is shown by the bill. We have not discussed the questions whether or not the city could be made legally liable for damages to the said owners of such real property, by reason of the passage and enforcement of an ordinance it had the

lawful right to enact, as that question is not presented for our consideration; nor is it necessary to refer to the *laches* of complainant, or the fact that it retained and still keeps the consideration it received for the grant, as additional reasons why the relief prayed for was properly denied. The decree is affirmed.

C. E. Dailey v. F. T. Phillips.

1. *APPEALS—A Matter of Statutory Regulation.*—The right to appeal from the final judgment, order or decree of an inferior court to a court having jurisdiction to review the record thereof, and correct errors therein, if any appear, is purely statutory, and the appeal must be taken to that court which is given jurisdiction by the statute to hear and determine such appeal.

2. *APPEAL—From Orders of the County Court Under the Assignment Act.*—An appeal allowed by the statute from orders of the County Court under the act in relation to assignments for the benefit of creditors must be taken to the Circuit Court.

Memorandum.—Proceedings under the act relating to the assignment for the benefit of creditors. Appeal from the County Court of Richland County; the Hon. T. A. FRITCHEY, Judge, presiding. Heard in this court at the August term, 1893, and appeal dismissed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

H. G. MORRIS and R. N. McCauley, attorneys for appellant.

J. I. MOUTRAY, attorney for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

On October 6, 1892, the appellee sold and delivered to Miller & Adams, his entire stock of drugs, fixtures, counters, safe, bottles and other property in his store in Olney, for \$1,900, of which sum said firm paid him \$1,000 in cash, and for the balance gave him their two notes for \$450 each, dated October 6, 1892, payable in eight and sixteen months respectively, with interest from date at six per cent.

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Said notes were secured by a chattel mortgage on said drugs, fixtures, counters, safe, bottles and other property, executed by said firm on day of sale, acknowledged October 3, 1892, and recorded November 4, 1892.

From the time of the sale and delivery to Miller & Adams of said property, the firm continued the sale of the goods bought of Phillips, in the usual course of retail trade at the store in Olney, and replenished the stock from time to time with goods bought from other dealers, mixing the old and new stock together, and selling from all alike, and appropriating the proceeds to their own use. Phillips knew all this, but made no objection, nor compelled the firm to account for said proceeds. This condition of affairs continued until May 24, 1893, on which date Louis Miller and Frank E. Adams, who constituted the firm of Miller & Adams, duly executed, acknowledged and delivered their deed of assignment to C. E. Dailey, conveying to him as their assignee the entire stock of goods and fixtures in said store. This deed contained the usual provisions of a deed of assignment and was duly recorded, and on the day of its date the assignee took possession under it of all the property.

Inventory of the insolvent assets so conveyed, and a list of the names of all creditors and the amount due each, were filed in the County Court, and Dailey gave bond as assignee, which was approved.

On the same day that the deed was so executed, acknowledged and delivered, and the assignee took possession under it, said firm confessed judgment in the Circuit Court of said county in favor of one of the creditors for \$535.

Execution was issued thereon *instanter*, and was placed in the hands of the deputy sheriff, who on the same day levied upon the goods then in possession of the assignee.

On the night of the same day, May 25, 1893, Phillips, the mortgagee, commenced a suit in replevin against the deputy sheriff, and Dailey, the assignee, and on the next day Coroner Miller took possession of the store and contents, under the writ of replevin, and afterward delivered the same to Phillips.

On June 3, 1893, on the petition of the assignee, the county judge issued a restraining order, ordering and directing the sheriff, deputy sheriff, Coroner Miller, attorney Phillips and Montray, or any person or persons for them, to refrain from interfering in any way with the assignee, in his management and control of said property, and that Phillips deliver the possession thereof to the assignee, to hold, and wait the future orders of the court.

Appellee, Phillips, in obedience to this order, surrendered his possession to the assignee. On June 5, 1893, appellee filed in said County Court a paper, notifying the judge thereof that all of said property belonged to him, said appellee, by virtue of the said chattel mortgage, and demanded a trial of "the rights of property in question." The trial was had July 14, 1893, and upon the hearing the court ordered that all the "fixtures, goods and chattels identified by F. E. Phillips as his property, mortgaged to him by Miller & Adams, now situated in the city drug store of the city of Olney, be returned to him, the said Phillips, assignee, to pay costs of this proceeding."

It is from this order the assignee took an appeal to this court. Appellee entered his motion here to dismiss the appeal, on the ground it should have been taken to the Circuit Court, and the disposition of this motion was reserved for further consideration, and not determined when the cause was taken. The right to appeal from the final judgment, order or decree of an inferior court to a court having jurisdiction to review the record thereof, and correct errors therein, if any appear, is purely statutory, and the appeal must be taken to that court only, which is given jurisdiction by the statute to hear and determine such appeal. Sec. 122, Chap. 37, p. 728, Starr & Curtis' Stat., provides that appeals may be taken to the Circuit Court from all final orders, judgments and decrees of the County Court, except as provided in Sec. 123 of the same act, which provides that appeals may be taken from final orders, judgments and decrees of the County Court to the Appellate and Supreme Courts, in proceedings for confirmation of special

assessments in proceedings for sale of lands for taxes and special assessments, and in all common law and attachment cases, and cases of forcible detainer, and forcible entry and detainer. These statutory provisions have been examined and applied by the Appellate and Supreme Court in cases where the same question was presented as that we are now considering. *Travers v. Rogers*, 16 App. Ct. Rep. 373, was a case in which Rogers, the appellee, had filed his petition in the County Court, in the matter of a bankrupt estate, claiming as his own certain personal property then in the possession of Rogers, as assignee of the insolvents, and asked for an order requiring the assignee to deliver to him the property he so claimed.

A hearing was had and an order was entered by the court, as in this case, finding said property to be the petitioner's, and directing the assignee to deliver the same to him. From this order the assignee took an appeal to the Circuit Court. Rogers appeared in that court and moved to dismiss the appeal on the ground that court had not jurisdiction. The motion was sustained and the appeal dismissed.

An appeal was taken by the assignee from this order of the Circuit Court to the Appellate Court. It was there held that the jurisdiction of County Courts, in cases of voluntary assignments for the benefit of creditors, is a special statutory jurisdiction, and that the petition filed by Rogers was an application to a court exercising this jurisdiction to release from its control and hand over to the petitioner certain of the assets claimed to be a part of the insolvent estate. That the order was not made in a common law case, and the appeal therefrom was properly taken to the Circuit Court, which court had jurisdiction, and erred in dismissing said appeal. In *People v. Prendergast*, 117 Ill. 588, it was held that an appeal from an order of the County Court, of the same kind in a like proceeding as in the case at bar, was properly taken to the Circuit Court; that such proceeding was not a common law case within the meaning of the statute. By the act of June 6, 1887, amending section 8 of the act to establish Appellate Courts, jurisdiction is conferred

upon said courts to hear and determine appeals from the final orders, judgments and decrees of County Courts in any suit or proceeding at law or in chancery, other than criminal cases, not misdemeanors, and cases involving a franchise or freehold, or the validity of a statute.

By this amendment we do not understand jurisdiction is given Appellate Courts to hear and determine appeals from the final order of a County Court in a case of this kind.

This was not a suit or proceeding at law or in chancery.

No process or notice was issued to any one as defendant, but an application was made, as in the cases cited, for the immediate release from the control of the court of a part of the assets of an insolvent estate, then in possession of the assignee, and delivery of them to the petitioner. Our view is supported by the authorities referred to, and no authority to the contrary has been furnished on behalf of appellant.

We feel constrained, therefore, to sustain the motion and dismiss the appeal. Appeal dismissed.

Alfred Shrimpton & Sons v. S. W. & E. T. Dunaway.

1. FRAUD AND CIRCUMVENTION—*A Question for the Jury*.—The question as to whether an order for goods was procured by fraud and circumvention is one to be determined by the jury upon the evidence.

2. FRAUD AND CIRCUMVENTION—*Contracts Founded Upon, Void*.—A suit can not be maintained upon a contract procured by fraud and circumvention.

3. CONTRACTS—*Omission to Read Before Signing—Fraud and Circumvention*.—The question as to whether a party is guilty of such negligence in not informing himself of the contents of an order for goods before signing it, as to preclude him from defense in a suit upon it, is one of fact to be determined by the jury.

4. CONTRACTS—*Parol Evidence*.—Parol evidence is not admissible to change or vary the terms of a written instrument, but it is admissible to show what the real contract of the parties was, and that an instrument evidencing another and different contract, was procured by fraud and circumvention.

Memorandum.—Assumpsit for goods sold, etc. Appeal from Justice's Court to County Court of Jackson County; the Hon. W. W. BARR, Judge,

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presiding. Trial by jury; verdict and judgment for defendant; plaintiffs appeal. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANTS' BRIEF, F. M. YOUNGBLOOD, ATTORNEY.

Did the written order as filled out by E. T. Dunaway and signed by him, when accepted by plaintiffs, constitute the contract between plaintiffs and defendants? I insist that it did; and when plaintiffs filled the order and shipped the goods, defendants were estopped thereby from showing by parol evidence that they ordered a less quantity of pins than mentioned in the order. *Schultz v. Plankinton Bank*, 40 Ill. App. 467; *Towler v. Black*, 136 Ill. 373; *Memory v. Niepert*, 131 Ill. 630; *Leiter v. Pike*, 127 Ill. 318; *Gray v. Suspension, etc., Mfg. Co.*, 127 Ill. 196; *Hair v. Johnson*, 35 Ill. App. 564.

To vary or avoid such a writing all parol testimony of negotiation, or agreements, or of conversations between or declarations of the parties or either of them, whether before or after the completion of the contract, will be rejected. *Graham v. Eiszner*, 28 Ill. App. 274; *Williams v. Fletcher*, 30 Ill. App. 228; *Covel v. Benjamin*, 39 Ill. App. 299; *Schneider v. Turner*, 130 Ill. 37.

If a person enters into a contract with another, between whom and himself no relation of especial trust or confidence exists, and it is reduced to writing by such other person, and a means of the knowledge of the terms of the writing is equally open to both, and he signs it without reading or having it read by some one for him, he can not avoid a liability created by the writing, even if its terms differ from the contract as agreed on verbally. *Hawkins v. Hawkins*, 50 Cal. 558; *Insurance Co. v. Hodgkins*, 66 Me. 109; *Keller v. Orr*, 7 N. E. Rep. 195; *Bank v. Steffes*, 6. N. W. Rep. 267; *McCormick v. Molburg*, 43 Iowa, 561; *Gullihier v. Railroad Co.*, 13 N. W. Rep. 432; *Wallace v. Railroad Co.*, 25 N. W. Rep. 772; *McKinney v. Herrick*, 23 N. W. Rep. 767.

And so where a shipper accepted a bill of lading or receipt from a carrier. Court of Appeals, in Insurance Co. v. Railroad Co., 72 N. Y. 90.

APPELLEES' BRIEF, WILLIAM A. SCHWARTZ, ATTORNEY.

If one of the parties to a contract had employed a bystander to make the writing or had admitted its accuracy, it would be receivable in evidence against him as an admission; but such writing, although of great weight, would not be conclusive. 1 Benjamin on Sales, in Sec. 204.

The rule that parol evidence is not admissible to vary the terms of a written instrument is not infringed by the admission of parol evidence showing that the instrument is altogether void, or that it never had any legal existence or binding force, by reason of fraud, etc. 1 Greenleaf on Evidence, Sec. 284.

An instrument may be shown to be void and without legal existence or efficacy, as for want of consideration, or for fraud or duress, or any incapacity of the parties, or any illegality in the agreement. 2 Parsons on Contracts, 6th Ed., 554; Jamison v. Beaubien, 3 Scam. 114.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Suit was brought in justice's court by appellants against appellees upon the following written order:

"2-22, 1892.

Order No. 75, Salesman, Bertrand.

ALFRED SHRIMPTON & SONS, Limited, 1-612.

Pin Department, 273 Church street, New York City.

Please put up for us 2½ great gross papers of pins, 200 pins in a paper, with our advertisement printed at the head of each paper and between the rows in following sizes, at 2½ cents per paper. Terms net 30 days one per cent 10 days M. ¼ C. S. ¼ C., one row black. Please print our advertisement as shown in the space below." (Then follows advertisement.) "Please ship as soon as you can prepare the goods by the cheapest way. S. W. & E. T. Dunaway."

Defendants recovered judgment for costs, and an appeal

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was taken by plaintiffs to the County Court where a trial was had with like result, and an appeal taken by the plaintiffs to this court.

In the printed argument for appellants it is said: "But one question is really presented by this record, and that is, did the written order, as filled out by E. T. Dunaway, constitute the contract between the plaintiffs and defendants?" And counsel then insist it did, and say, "When plaintiffs filled the order and shipped the goods, defendants were estopped thereby from showing by parol evidence, that they ordered a less quantity of pins than mentioned in the order." There is some conflict in the evidence as to whether the written order truly evidenced the contract between the parties, or was an instrument, the execution of which was procured by the fraud and circumvention of plaintiffs' agent, and set forth a different contract. If the jury chose to believe the testimony of Bertrand, appellants' agent, in preference to the testimony introduced on behalf of appellees, they could have found that E. T. Dunaway made the contract with said agent to buy of appellants two and a half great gross, or 4,320 papers of pins at two and one-third cents per paper, and filled out the blanks and signed the firm name to the order evidencing such contract, of his own volition, and without any suggestion or direction of said agent.

If, however, the jury believed the testimony of appellees and Hern, their clerk, in preference to that of Bertrand, they would be warranted in finding that S. W. Dunaway, the senior member of the firm, made the contract with appellants' said agent. That it was for the purchase of two and a half gross, or 360 papers of pins at two and one-third cents per paper. That Bertrand so understood it and agreed to it, and when the trade was closed, S. W. Dunaway was called away to wait on a customer and directed his son, E. T. Dunaway, who had just come in the store, to sign the contract. That Bertrand knew the order which, in accordance with the completed contract, was to be for 360 papers of pins, and no more, was the real contract the son was di-

rected to sign, and knew the son had not heard the contract made, and was not informed of the terms thereof, yet with this knowledge on the part of plaintiffs' agent the son, relying on the honesty of Bertrand, and under his direction, was fraudulently induced to, and did fill up blanks, and execute the order for 4,329 papers of pins, evidencing a contract which has never been made by the parties. This evidence would justify the finding that the execution of the order sued upon was procured by fraud and circumvention on the part of appellants' agent, and no suit based thereon can be maintained. It was the province of the jury to determine the weight and credibility of the testimony introduced on behalf of the parties respectively, and they evidently gave more credence and greater weight to the testimony of appellees and Hern, than to that of Bertrand, and found accordingly.

It is insisted on behalf of appellants, that parol evidence introduced to impeach the validity of the order sued upon, by showing the making thereof was procured by the fraud and circumvention of plaintiffs' agent, was improperly admitted, and that defendants were guilty of such negligence in not informing themselves of the contents of the order before signing, as to preclude them from defense in a suit upon it. Touching the last point it is enough to say that it is a question of fact whether defendants were guilty of such negligence, or whether the facts and circumstances proven by defendants furnished sufficient excuse for the omission to read the order before signing. The evidence justified the jury in finding that defendants were not guilty of negligence by reason of such omission. *Munson v. Nichols*, 62 Ill. 114; *Livingston v. Strong*, 111 Ill. 152.

We are of the opinion, also, the parol evidence was properly admitted to prove the real contract of the parties, and that the execution of the order evidencing another and different contract, was procured by the fraud and circumvention of plaintiffs' agent. This ruling does not contravene the rule that parol evidence is not admissible to change or vary the terms of a written contract, and is the law in this

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State, as announced by our Supreme Court in repeated decisions, among which is *Black v. Wabash, St. L. & P. Ry. Co.*, 111 Ill. 351, cited in appellees' brief. We desire to say also that it appears in evidence when the box of pins arrived at Carbondale, Dunaway immediately notified appellants that the amount of pins were not ordered, and were subject to their order, and receiving no reply, returned the pins within a reasonable time to appellants. The instructions given on behalf of defendants informed the jury correctly as to the law, and it was not error to give them. The same questions here presented were decided by this court in the case of *Shrimpton & Sons v. Poole*, 45 App. Ct. Rep. 649, and we adhere to our ruling in that case. The judgment is affirmed.

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1. **GAMBLING CONTRACT**—*Notes Given Upon, Void.*—A promissory note given for a consideration based upon a criminal and prohibited contract, is void.

2. **PROMISSORY NOTES**—*Void Where Made, Void Everywhere.*—A promissory note, void by the law of the State where it is made, will be held void by the courts in which suit is brought to recover thereon.

3. **PROMISSORY NOTES**—*When Void in the Hands of an Assignee Before Maturity.*—A promissory note based upon a gambling contract, and void by the laws of the State where it is made, does not become valid and binding in the hands of an assignee before maturity.

4. **VOID INSTRUMENTS**—*Effect of an Assignment, etc.*—A void instrument can not be given validity by assigning it. And while such assignment may not be entirely without operation between the parties to it, yet the void instrument can never itself be made the basis of a recovery at law or in equity.

5. **CONTRACTS**—*Lex Loci Contractu, Lex Fori.*—There are many cases in which comity requires the application of the *lex loci contractu* and the enforcing of the terms of a contract, although in contravention of the policy of the *lex fori*. But this rule is never adopted in this State when it would contravene our criminal law, or sanction vice or immorality, or is against a positive prohibition of our law.

6. **GAMBLING CONTRACTS**—*Void by the Law of the State Where Made.*—When the transactions of parties in a sister State are criminal, and prohibited by the laws of that State, and also criminal by the laws of this State as gambling contracts and void, a note given for a con-

sideration based thereon is also void, even in the hands of an assignee before maturity.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Clinton County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

HENRY D. LAUGHLIN, R. C. LAMBE and M. P. MURRAY,
attorneys for appellant.

APPELLEE'S BRIEF, VAN HOOREBEKE & FORD, ATTORNEYS.

A contract against public policy will not be enforced anywhere. We think the following authorities fully sustain this position. *Beveridge v. Hewitt*, 8 Brad. 467; *Cothran v. Ellis*, 125 Ill. 496; *Irwin v. Williar*, 110 U. S. 499.

If a contract is valid where made, yet if against public policy or repugnant to the policy or positive institutions of the State where suit is brought, it will not be enforced. *Phinney v. Baldwin*, 16 Ill. 108; *Chewning v. Johnson*, 5 La. Ann. 678; *Greenwood v. Curtin*, 6 Mass. 358, 377; *Kent Com.* (7th Ed.) Vol. 2, top p. 567, 570, 571; *Story's Conflict of Laws*, Secs. 29, 38 and 327; *Mumford v. Canty*, 50 Ill. 375.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Joseph Hanke executed three notes in the State of Missouri, dated October 1, 1890, payable to D. P. Grier Grain Co., of St. Louis, Mo., and delivered the same to the payee, each bearing interest from date at the rate of seven per cent. per annum. One of said notes was for \$3,768.68, due in two months; one for \$2,556.43, due in four months, and one for \$2,556.42, due in six months. These notes were assigned before maturity by payee to William S. Pope, who brought this suit to recover the amount alleged to be due him thereon. The cause was tried by the court by agreement, and a finding and judgment for defendant resulted.

These notes were given to D. P. Grier Grain Co., to set-

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the certain grain transactions on the board of trade in St. Louis, and they represent a portion of the losses of Hanke in those transactions. The special pleas set up in defense, first, that the notes were given in settlement of amount claimed by said D. P. Grier Co. to be due from defendant upon a gaming contract, whereby said company gave defendant an option to buy and sell certain wheat and corn—which defendant did not intend to deliver, nor the company intend to receive—the said notes being given to pay said company the difference between the market price on day of settlement, and the price at which defendant took said option; that the foregoing gaming contract was the sole consideration of said notes, and said notes were void under the statute. Second special plea sets up substantially the same facts, but avers the gaming contract was made in Missouri, and under the statute of that State said notes are wholly void. Sets up and relies on said statute as a bar to the recovery. Replications to the special pleas were, first, that the notes were sold and assigned to plaintiff for value, before maturity, without notice of defect or illegality of consideration, all in the State of Missouri, and are by the laws of that State in the hands of plaintiff valid and binding obligations; second, that the cause of action is founded upon a legal, valid and just consideration, and not upon a gaming contract. Issue was joined on these replications.

There was ample evidence to warrant the court in finding the notes were given in settlement of differences under option deals between the Grier Grain Co. and Hanke, as averred in the pleas. He testifies to that fact, and there is abundant evidence in the record corroborating him, the account rendered to Hanke by the grain company showing the amount and character of the transactions between them from July 19 to October 29, 1890, upon which the settlement was made, and for the balance claimed to be due, as therein stated, said notes were given, consisting almost entirely of items of cash paid by Hanke, and items of "loss" and "gain;" to illustrate, we insert the following copy of a part of said account introduced in evidence :

EXHIBIT I.

Joseph Hanka, Esq., Trenton, Ills., in account with D. P. Grier Grain Co.

July 19.	To loss 100 Aug. wheat.....	\$ 56.25
" 25.	To loss 50 Sept. corn.....	337.50
" 25.	To loss 30 Dec. wheat.....	731.25
" 26.	To cash.....	500.00
" 28.	To loss, 5 Dec. wheat.....	3.12
" 28.	To cash.....	300.00
" 29.	To loss, 20 Dec. wheat.....	162.50
Aug. 1.	To loss, 75 Dec. wheat.....	1,990.63
" 7.	To loss, 25 Dec. wheat.....	15.63
" 14.	To loss, 145 Sept. corn.....	4,146.87
" 15.	To loss, 5 Sept. corn.....	178.13
" 16.	To loss, 25 Dec. wheat.....	140.62
" 19.	To loss, 100 Dec. wheat.....	225.00
" 19.	To loss, 75 Sept. corn.....	1,653.13
" 21.	To loss, 100 Dec. wheat.....	281.25
" 21.	To loss, 35 Sept. corn.....	915.63
" 21.	To loss, 150 May corn.....	31.25
" 26.	To loss, 125 Dec. wheat.....	1,709.38
July 12.	By cash, cr.....	500.00
" 14.	By gain, 50 Sept. corn.....	375.00
" 17.	By gain, 70 Sept. corn.....	512.50
" 22.	By gain, 25 Aug. wheat.....	31.25
" 23.	Rebate com., 25 Aug. wheat.....	15.62
" 23.	By gain, 25 Sept. corn.....	109.38
" 23.	By gain, 50 Sept. corn.....	156.25
" 24.	By gain, 75 Aug. wheat.....	203.13
" 24.	By gain, 25 Aug. corn.....	265.62
" 28.	By gain, 20 Sept. corn.....	43.75
" 28.	By gain, 20 Sept. corn.....	231.25
" 29.	By gain, 5 Sept. corn.....	53.13
" 29.	By gain, 25 Sept. corn.....	115.62
" 30.	By gain, 80 Sept. corn.....	731.25
" 31.	By cash put.....	210.00
" 31.	By cr. in.....	6.25
Aug. 1.	By cash.....	225.00

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Aug.	1.	By gain, 25 Sept. corn.....	\$ 109.38
"	2.	By gain, 125 Sept. corn.....	553.12
"	2.	By cash.....	195.00
"	4.	By cash.....	305.00
"	5.	By gain, 50 Dec. wheat.....	562.50
"	6.	By cash.....	150.00
"	7.	By gain, 75 Sept. corn.....	84.37
"	7.	By cash.....	150.00
"	9.	By gain, 50 Dec. wheat.....	537.50
"	9.	By cash.....	10.00
"	9.	By cash.....	80.00
"	9.	By cash.....	800.00
"	9.	By cash.....	140.00
"	11.	By cash.....	50.00
"	11.	By gain, 75 Dec. wheat.....	1,390.63
"	11.	By gain, 20 Sept. corn.....	237.50

Hanke also testified: "The three notes sued on were given for a balance for options. I had bought grain, and grain fell in value in St. Louis, and the three notes made the difference that I was behind in the deals." That during the period of three months and ten days these option deals covered 2,190,000 bushels of wheat, 1,420,000 bushels of corn and 60,000 bushels of oats. None of the grain traded in was delivered or offered to be delivered. Curry, secretary of the grain company, substantially admits the transactions set out in the account rendered were as Hanke stated, and also says: "Hanke's name was never disclosed as a principal in the transactions," nor does it appear he was informed who the persons were from whom the grain was claimed to have been purchased. Without lengthening this opinion by detailing here at length the evidence introduced, it is sufficient to say we are satisfied the transactions between Hanke and the D. P. Grier Grain Co., were gambling contracts and void in the State of Missouri at the time they were made. The statute of Missouri, Rev. Stat. 1889, read in evidence, provides, Sec. 3931, that all purchases and sales, or pretended purchases and sales, or contracts for the purchase and sale of grain and other named articles, either

on margin or otherwise, without intention of receiving and paying for the property so bought, or of delivering the property so sold, and all the buying and selling, or pretended buying and selling of such property on margins or optional delivery when the party selling the same or offering to sell the same does not intend to have the full amount of the property on hand, or under his control, to deliver upon such sale, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the full amount of the same if purchased, are declared to be gambling and unlawful, and are prohibited. The penalty prescribed for a violation of said provisions is a fine not less than \$300, nor more than \$3,000. Sec. 3932, provides: It shall not be necessary to constitute the offense defined in Sec. 3931, that both buyer and seller agree to do any of the acts prohibited in said section. But the offense is complete against the party thus pretending, or offering to sell, or buy, whether such offer is accepted or not. Sec. 3936 makes all contracts made in violation of this act, gambling contracts, and void.

The foregoing statutory provisions were in force when the deals in grain options were made between Hanke and the Grier Grain Co., in the State of Missouri, and as we understand the evidence, those transactions were gambling contracts, and void within the meaning of that act, and the notes given for a consideration based upon such criminal and prohibited contracts are also void, and no authority need be cited in support of the proposition that if they are void in Missouri, the place of the contract, they will be held void by the courts in which suit is brought to recover thereon.

It is insisted, however, on behalf of appellant, that if the notes were void in the hands of the original payee, they became valid by assignment for value to appellant before maturity. To so hold would aid in defeating the purpose designed to be accomplished by wise legislation, viz., the suppression of a species of gambling, quite as extensive in its operations, pernicious in its influences, and ruinous in the consequences to its votaries, as any other kind of gaming,

and we can not hold that a note which is the offspring of criminal acts, and for that reason is a void instrument in the hands of the original payee, a participant in the criminal acts, becomes valid and binding when assigned by him, and he be thus permitted indirectly to collect unlawful gains in defiance of the statute. Such is not the law in this State. Notes given for money won at gaming are held absolutely void even in the hands of an assignee before maturity. *Williams v. Judy*, 3 Gil. 282; *Madert v. Butcher*, 41 Ill. 382. And it is said in *County of Cook v. Lane*, 23 App. Ct. Rep. 649, a void instrument can not be given validity by assigning it. And while such assignment may not be entirely without operation between the parties to it, yet the void instrument can never itself be made the basis of a recovery at law or in equity.

In the case of *Tenny et al. v. Foote*, 4 Brad. 594, the suit was brought by the assignee, before maturity, of a note given in settlement of option deals, as were the notes in the case at bar, and the opinion of Judge McAllister, who tried the case in the Circuit Court, was adopted as the opinion of the Appellate Court. In that opinion it is said: "It is immaterial whether plaintiffs be *bona fide* holders of the note or not, if the contract between Hooker & Co. and Foote was a gambling contract, and within the statute against gambling, because the statute itself renders void all contracts, notes, bills or other securities, where the whole or any part of the consideration arises out of a gambling transaction;" and the judgment for defendant was affirmed. The cause was then taken to the Supreme Court and judgment affirmed. It is reported in 95 Ill. 99, and in the opinion it is said: "We may add, in conclusion, we see no objection to the law as announced in the opinion adopted by the Appellate Court, and written by the circuit judge, who was formerly a distinguished member of this court." It is also insisted on behalf of appellant that the notes sued on were Missouri contracts, and the courts of this State will ascertain the rights of the parties according to the laws of that State, and enforce them. Several cases decided in Mis-

missouri are cited to show the rule held was that a note given for like consideration as those in this case, was valid in the hands of an innocent assignee. The cases cited were decided before the Missouri statute of 1889 was enacted, and in addition to that, as a reply to such contention it appears, as before shown, that the rule held by our Supreme Court is directly to the contrary. There are many cases in which comity requires the application of the *lex loci contractu* and the enforcing of the terms of a contract, although in contravention of the policy of the *lex fori*. But this rule is never adopted in this State, when thereby it would contravene our criminal law, or sanction vice, or immorality, or is against a positive prohibition of our law. By the provisions of Sec. 130 of our Criminal Code and under the decisions of our Appellate and Supreme Court, the transactions between the Grier Grain Co. and Hanke must be held to be criminal acts, prohibited by our law, defined as gambling contracts and void, and the note given for a consideration based thereon, must also be held void in the hands of appellant.

The case at bar, therefore, is one of the excepted cases in which comity does not require us to adopt the rule announced in the Missouri cases, even if we held that those decisions were the law in Missouri at the time these notes were executed, which we do not. The motion to tax costs for additional abstract, which was reserved to be passed on when the cause should be finally decided, is overruled. .

The judgment is affirmed.

George M. Whittaker v. T. H. Gutheridge et al.,
Supervisors, etc.

1. HIGHWAYS—*Injunction To Prevent Laying Out*.—As a general rule, a bill for an injunction will not lie to restrain the laying out of a highway unless the proceedings are void for the want of jurisdiction on the part of the commissioners or supervisors.

2. HIGHWAYS—*When Equity Will Restrain the Opening*.—Where an

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order of the commissioners establishing a highway is void for want of jurisdiction, a court of equity may entertain a bill to enjoin the opening of the road.

8. *HIGHWAYS—Requisites of a Petition To Lay Out.*—A petition to lay out a highway stated that the petitioners resided within “t-h-o-w” miles of the road in question. *It was held* that in view of the fact that the statute says *two*, and that these letters are intended to designate the number of miles, and represent *two* better than any other number from one to infinity, the petition was sufficient to confer jurisdiction upon the commissioners.

4. *HIGHWAYS—Requisites of the Petition.*—Where a petition for a road stated that “the road begins on the west line of section three, between sections three and four, and runs on said line to the southwest corner of section three, and thence east on the south line of that section to the southeast corner thereof, where it intersects a road running north and south between sections two and three in said town, county and State, the petition being addressed to the commissioners of highways of the town of Lawrence, in the county of Lawrence, in the State of Illinois, *it was held* that these allegations show that the highway in question is wholly within the town of Lawrence.

5. *HIGHWAYS—Requisites of a Petition for an Appeal to the Supervisors.*—Where a petition filed with a justice of the peace for an appeal from the decision of the highway commissioners, alleged that the person taking the appeal was directly interested in the decision, *it was held* that the term “interested in the decision,” meant that he was the owner of land adjoining the road to be laid out or vacated, and is sufficient unless other allegations negative this meaning.

6. *HIGHWAYS—Amendment of Petition for an Appeal to the Supervisors.*—A petition for an appeal from an order of the commissioners of highways to the supervisors was amended so as to show that the petitioners who stated they were interested in the decision were the owners of land adjoining the road sought to be laid out. *It was held* that there is no objection to the allowance of such an amendment.

7. *HIGHWAYS—Appeals to Supervisors—Who Is a Land Owner.*—A testator devised his land to his wife with power to sell, etc.; at her death it was to go to his sons, provided they should pay all debts owing by him at his death, and by his wife at her death, and the funeral expenses of both. *It was held*, that the sons were given such an ownership of the land devised as to clothe them with the right to appeal under the road and bridge act.

8. *WILLS—Construction of—Devisees Creating Life Estates with Power of Sale.*—A power of sale added to a life estate does not raise the estate to a fee, but a will may create a life estate with power to sell and convey the fee, and at the same time devise a remainder to take effect on the determination of the life estate.

Memorandum.—Bill for an injunction restraining the opening of a highway. Appeal from the Circuit Court of Lawrence County; the

Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1898, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

W. F. FOSTER, attorney for appellant.

GEE & BARNES, attorneys for appellees.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant filed a bill to enjoin appellees, who were supervisors of certain towns in Lawrence county, from laying out and opening a certain road in said county, or assessing damages for the land taken, or doing any act to carry into effect an order theretofore made by them, granting the prayer of the petition for laying out the road. Appellees filed an answer to the bill. On the hearing, the temporary injunction which had been issued was dissolved, and the bill was dismissed. Aside from the alleged want of jurisdiction of the commissioners of highways to act on the petition, or of the supervisors to hear the appeal, the ground upon which equitable relief is asked may be found in the following allegations of the bill: "Your orator further represents that the said supervisors, as aforesaid, are now proceeding in accordance with said order, so made by them on said appeal, granting the prayer of said petition to take releases for right of way, and have filed a certificate with a justice of the peace to condemn the land of your orator, over which said proposed road will run, and that, unless restrained by the order and injunction of this honorable court, the said supervisors, as aforesaid, will condemn the land of your orator and lay out and open said road as aforesaid under said void, unwarranted and illegal order, as aforesaid." If the commissioners and supervisors had jurisdiction, these allegations of the bill furnish no ground for the interference of a court of equity.

It was held in *Winkler v. Winkler et al.*, 40 Ill. 179, that the simple act of presenting a petition to the commissioners of highways for a private road, and the expressed determination on their part to act on that petition and grant the 'hereof, by ordering a survey of the road, afforded

no ground for an application to a court of chancery for an injunction, inasmuch as there was a remedy by appeal if the commissioners should allow the petition. In *Bailey et al. v. McCain et al.*, 92 Ill. 277, it was held that where commissioners of highways, having acquired jurisdiction, make an order changing and altering a previously established road, and in doing so, proceed illegally and irregularly, the remedy for any one aggrieved is by appeal or *certiorari*, and if he neglects to avail himself of his legal remedy, a court of equity will not interfere in his behalf. In *Dickerson v. Commissioners of Highways*, 18 Bradw. 88, proceedings to lay out a road had progressed regularly to the point where damages had been assessed to complainant and released by the other owners, whereupon the commissioners, learning that the parties relied on declined to pay the damages, refused to proceed further on their part except to file all the papers in the town clerk's office. Afterward another petition, identical with the first, was presented to the commissioners, who decided to grant the prayer of the petition, and proceeded to take steps to have the complainant's damages assessed. The complainant filed a bill to enjoin further proceedings under the second petition, contending that the proceedings under the first petition could not be abandoned without his consent after his damages had been assessed, and should be considered as a bar to any action under the second petition. The Appellate Court, without deciding this question, held that the complainant had an adequate remedy at law, and affirmed the decree of the court below, dismissing the bill.

Under the authority of the foregoing cases, we are of the opinion that the bill in this case shows no sufficient reason for the interposition of a court of equity by injunction, unless the proceedings to lay out the highway are void for want of jurisdiction on the part of the commissioners or supervisors. It has been held that where an order of the commissioners establishing a highway is void for want of jurisdiction, a court of equity may entertain a bill to enjoin the opening of the road. *Frizell et al. v. Rogers*, 82 Ill. 109. It is therefore incumbent upon us to inquire whether or not

the commissioners in the first instance, and the supervisors, on appeal, had jurisdiction and were authorized to act on the petition.

It is said that the commissioners acquired no jurisdiction because the petition did not show that the petitioners resided within two miles of the proposed road. The evidence shows that at least twelve of the petitioners resided within the limits required by law. But the question here is not, what is the fact, but what is the allegation of the petition? Does t-h-o-w mean two, or three, or nothing? Appellant says it means three or nothing. Appellees say it means two. In view of the fact that the statute says two, and that these letters are intended to designate the number of miles, and represent two better than any other number from one to infinity, we are inclined to hold that the meaning is sufficiently plain and that the petition is sufficient to confer jurisdiction.

It is next urged that the petition does not show that the proposed road was in the town of Lawrence, to the commissioners of which town the petition was addressed. The petition shows that the road begins on the west line of section three, between sections three and four, and runs on said line to the southwest corner of section three, and thence east on the south line of that section to the southeast corner thereof, where it intersects a road running north and south between sections two and three in said town, county and state. The petition is addressed "To the commissioners of highways of the town of Lawrence, in the county of Lawrence, in the State of Illinois." These allegations show clearly that the highway in question lies wholly within the town of Lawrence.

It is insisted, in the next place, that the supervisors had no jurisdiction on appeal because the petition for the appeal did not show that the individuals praying the appeal were the owners of land adjoining the road. The record shows that after the commissioners had rejected the prayer of the petition, Thomas H. Seed and Frank C. Hardacre filed a petition with a justice of the peace,

praying for an appeal. This petition as filed with the justice alleged that Seed and Hardacre were directly interested in the decision. The question arises, must the petition for an appeal set forth how the petitioner is interested, or is an allegation in the language of the statute sufficient? Undoubtedly it would be proper to show upon the hearing before the supervisors that the petitioner praying the appeal was not interested in fact in the manner contemplated by the law. But would not the allegation that he was interested in the decision be sufficient to give the supervisors jurisdiction? We are referred to *Commissioners of Highways v. Quinn et al.*, 136 Ill. 604, as holding the contrary. In that case the petition showed upon its face that the petitioner did not own land adjoining the road. The court held that the phrase "interested in the decision" did not apply to one having a remote interest, but to the owner of adjoining land. Therefore to allege that one is interested in the decision means that he is the owner of land adjoining the road to be laid out or vacated, and is sufficient unless other allegations negative this meaning, as was true of the *Quinn* case. In the case before us the supervisors permitted the petition to be made more specific by amendment, so as to show that said Seed was the owner of land adjoining the road sought to be laid out. We see no objection to the allowance of such an amendment, and think, on an examination of the whole record, that the appeal was duly perfected.

But it is said that even if the petition for an appeal should be held sufficient on its face, yet the evidence upon the hearing of this cause in the Circuit Court showed that neither of those appealing was the owner of land adjoining the road. This assertion, if established, might furnish a substantial reason for the interference of equity, inasmuch as no appeal can be taken from the supervisors, and their want of jurisdiction does not appear upon the face of the record, and therefore can not be taken advantage of on *certiorari*.

We turn to the record in this case to ascertain whether or not the fact is as alleged. Samuel I. Seed, the father of

Thomas H. Seed, was the owner of land over which the proposed road runs. He died before these proceedings were begun, and left surviving him his widow and three sons and two daughters mentioned in his will. He devised to his wife all his property to be used and enjoyed by her during her natural life. He gave her full power and authority to sell and convey such of his real estate or personal property as she might deem proper. After the wife's death, all the real estate not disposed of by her was to go to the testator's three sons, one of whom was Thomas H. Seed, as above stated, provided they should pay all debts owing by the testator at his death and by his wife at her death, and the funeral expenses of both. Whatever remained of the personal property at the wife's death was to go to the two daughters, and was not to be chargeable with any of the debts above referred to. Does this will give the real estate in fee to the widow? If not, the right of Thomas H. Seed to appeal is beyond dispute. It seems to us that the proper construction of this will is clearly indicated in *Hamlin et al. v. United States Express Co.*, 107 Ill. 443; *Walker v. Pritchard et al.*, 121 Ill. 221, and *Ducker et al. v. Burnham et al.*, 146 Ill. 9. In these cases it was held that a power of sale added to a life estate does not raise the estate to a fee, but that a will may create a life estate with power to sell and convey the fee, and at the same time devise a remainder to take effect on the determination of the life estate. The construction of Samuel I. Seed's will in accordance with this rule of law, gives Thomas H. Seed such an ownership of the land devised, as to clothe him with the right of appeal under the road and bridge act. The evidence relating to the payment of the indebtedness mentioned in the will need not be considered, for the reason that if the payments required should not be made, the land would descend as intestate estate, and Thomas H. Seed would be the owner of an interest therein in either event. None of the other objections argued by appellant are jurisdictional. There was no case for the cognizance of a court of equity before the chancellor, and the decree dissolving the temporary injunction and dismissing the bill should be and is affirmed.

W. W. Reade v. S. S. Kerr, Garnishee of Robert H. Talbott.

1. **EXEMPTIONS—Exempt Property Converted into Debt Subject to Garnishment.**—Where a judgment debtor makes and delivers a schedule of property he claims as exempt, and afterward converts a part of the property into a debt, he can not claim such debt as exempt from a subsequent execution issued under the same judgment, even though he then had less property, including said debt, than is allowed by the statute, and such debt is subject to garnishment.

2. **EXEMPTION LAWS—Rule of Construction.**—Exemption laws are purely statutory, and the benefit thereof can be availed of by a certain defined class of debtors only, and upon certain conditions.

3. **EXEMPTIONS—Money Due the Debtor.**—The effect of the provision in section 2 of the act approved June 10, 1887 (Laws 1887, 142), is to forbid the judgment debtor from selecting as property exempt from attachment, execution, distraint or garnishment, *money* due him, whatever may have been the consideration for the debt, or the circumstances out of which it arose.

4. **EXEMPTIONS—Fifty Dollars Exempt, Due for Wages.**—The proviso of Sec. 2 of the act of June 10, 1887 (Law 1887, 142), providing that no exemption shall be allowed to the debtor from any money due him from any person whatever, does not abrogate the right of the debtor, if the head of the family, as provided in Sec. 4 of the Garnishment Act, to hold as exempt \$50 due him for wages, or defeat his right to hold as exempt for one year, the proceeds of the sale of a homestead, and insurance money due him for loss on building exempted as a homestead, as provided for in Secs. 6 and 7 of the Homestead Exemption Act.

Memorandum.—Garnishment. Appeal from the Circuit Court of Gallatin County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, JESSE E. BARTLEY, ATTORNEY.

As we view the law as it now exists, the fact of converting personal property into a debt makes the debt liable to garnishment process, whether the property so converted was exempt or not. *Wooster v. Page*, 54 N. H. 125; *Scott v. Bingham*, 26 Vt. 251; *Knabb v. Drake*, 23 Penn. 489;

Harrier v. Fasset, 9 N. W. Rep. 217; Brown v. Heath, 45 N. H. 165; Spillman v. Aldridge, 126 Mass. 113; Finlen v. Howard, 126 Ill. 259; Monniea v. German Ins. Co., 12 Ill. App. 240; when a particular execution against which a schedule is made is returned, the schedule loses its vitality, and if the debtor desires to avail himself of the benefit of the exemption laws, he must make a new schedule upon the issuing of each subsequent execution, for which see Holler v. Coleson, 23 Ill. App. 324; Biggs v. McKenzie, 16 Brad. 286; Camp et al. v. Ganley, 6 Brad. 499.

APPELLEE'S BRIEF, PILLOW & MILLSPAUGH, ATTORNEYS.

Appellee contended that property exempted by law may be sold or exchanged by the debtor without subjecting it or its equivalent to execution or garnishment. Vaughan v. Thompson, 17 Ill. 78; Green v. Markes, 25 Ill. 223; Brown v. Coon, 36 Ill. 248; Bliss v. Clark, 39 Ill. 590.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

It appears by the record that appellant, Reade, on January 9, 1890, recovered a judgment against Robert H. Talbot for \$72.81 and costs, in justice's court, before Bartley, justice of the peace; that on November 28, 1890, an execution was issued thereon, which was returned December 15, 1890, *nulla bona*.

On November 28, 1892, appellant filed his affidavit before said justice setting forth that he had obtained said judgment; that execution was issued thereon and returned as above stated; that he knew of no property of the defendant subject to execution, and that he has just reason to believe S. S. Kerr is indebted to defendant. Garnishee summons was thereupon issued and served on Kerr, who appeared and answered that he owed Talbot \$192.95, whereupon judgment was rendered by the justice against Kerr as garnishee, and he prayed and perfected an appeal to the Circuit Court, where the cause was submitted and tried by the court without a jury, upon the following stipulation, and a finding and judgment for Kerr resulted, whereupon Reade craved,

Reade v. Kerr.

and was granted, an appeal to this court. There had been a second execution issued on Reade's judgment against Talbot on November 15, 1892, which was returned *nulla bona* November 28, 1892.

Stipulation of facts, upon which the cause was tried and decided.

First. It is agreed that W. W. Reade has a judgment against Robert Talbot for the amount of his claim before the justice of the peace.

Second. That execution issued on the judgment and that the defendant Talbot scheduled in apt time. There was no appraisement of the scheduled property. That Talbot was the head of a family and resided with them. That the property scheduled was worth less than \$400.

Third. That the corn sold to Kerr, for which he was indebted to Talbot in amount that he answered before the justice, was included in the schedule.

Fourth. That Kerr owes Talbot \$142.50, being the purchase price of the corn included in the schedule.

Fifth. The corn was sold to Kerr after the schedule was made and delivered to the officer, and before any other execution issued.

This question is presented for our decision :

Is the \$192.95, which Kerr owes Talbot for corn, *included in the schedule*, and which he purchased of the latter after said schedule was delivered to the officer, and before any other execution was issued, liable to said process of garnishment, and could a judgment be lawfully entered against Kerr, as garnishee of Talbot, for that debt?

The trial court held that because the corn had been properly scheduled and was exempt from execution, therefore the debt created by the sale thereof to Kerr, was exempt from garnishment. Exemption laws are purely statutory, and the benefit thereof can be availed of by a certain defined class of debtors only, and upon certain conditions. Personal property is the kind of property involved in this case, and the exemption statutes affecting that class of property must be our guide in deciding the question submitted.

The section providing for the exemption of certain personal property from attachment, sale on execution, and from distress for rent, as originally framed, was held by the Supreme Court in *Fanning v. Nat. Bank*, 76 Ill. 53, to include as property that might be exempted, *money* due the debtor. But after that decision was made, and in 1877, the legislature, doubtless for the purpose of establishing a different rule, enacted the following proviso to said section: "Provided that such selection and exemption shall not be made by the debtor, or allowed to him or her, from any money, salary or wages due him or her from any person or persons or corporation whatever." The language of this proviso is plain and unambiguous, and we understand the meaning and intent is to forbid the judgment debtor from selecting as property exempt from attachment, execution, distraint or garnishment, *money* due him, whatever may have been the consideration for the debt, or the circumstances out of which it arose. Of course, this proviso does not abrogate the right of the debtor, if the head of a family, as provided in Sec. 14 of the Garnishment Act, to hold as exempt \$50 due him for wages, or defeat his right to hold as exempt for one year, the proceeds of the sale of a homestead, and insurance money due him for loss on building, exempted as a homestead, as provided in Secs. 6 and 7 of the Homestead Exemption Act.

Subject to these exceptions a judgment debtor, in a garnishee proceeding, can not claim and be allowed the exemption provided in Sec. 1 of the act of 1877, out of money due him. We are fortified in so construing said proviso by the decision of our Supreme Court in *Finlin v. Howard*, 126 Ill. 259, and *Monniea v. German Ins. Co.*, 12 App. Ct. Rep. 240.

And when, as in this case, a judgment debtor makes and delivers a schedule of property he claims as exempt, and afterward converts a part of the property into a debt, he can not claim such debt as exempt from a subsequent execution issued under the same judgment, even though he then had less property, including said debt, than is allowed by

the statute, and such debt is subject to garnishment. *Finlin v. Howard*, 26 App. Ct. Rep. 66.

The conclusion we have reached is that the debt Kerr owed Talbot at the time said garnishee process was served, was subject to garnishment, was not exempt, and the judgment should have been entered in favor of Talbot for the use of appellant against Kerr, as garnishee of Talbot, for the amount of the debt, and it was error to render judgment for the defendant. The judgment is reversed and cause remanded.

52	471
61	607

James H. Wallace v. James R. Stengall.

1. **PARTNERSHIP—*Marshaling of Firm Assets.***—In the marshaling of assets composed of individual and partnership property, partnership creditors have prior right to have their debts satisfied, to the exclusion of individual creditors, out of partnership property, with a right to the surplus after satisfaction of individual debtors, of separate property. This right in the partnership creditor exists because of the right of the parties to so have the partnership property applied.

2. **PARTNERSHIP—*Effect of the Firm Property Vesting in an Outside Party.***—When the partnership property vests in an outside party, the interest of the partners in it is thereby terminated, and with their interest terminates that of the firm creditors.

3. **PARTNERSHIP—*Lien of the Partner on the Firm Property.***—The lien of the partner is not a limitation upon the *jus disponendi*, and therefore the partnership liens can not be asserted or enforced after its exercise. The right of the partnership to dispose of all the firm property rests exactly upon the same right that each member has, to dispose of his individual property.

4. **PARTNERSHIP—*Power to Dispose of Firm Property.***—Partnership property can be sold by the firm to pay an individual debt of one of the partners, or it may be disposed of by sale to one member, in order that he may so sell or use it. Although sold to one partner, with agreement that the property should be applied to the payment of partnership debts, yet this would not prevent a sale to and vesting of good title, free from partnership lien, in one who purchased without notice.

5. **PARTNERSHIP—*Insolvent—Right to Sell Firm Property.***—A partnership, though insolvent, may sell its property to whomsoever it desires, though thereby the individual creditor of one partner is preferred to the exclusion of partnership creditors.

6. SALES—*A Person in Good Faith Protected.*—A person who purchased, in good faith, the property of a partnership entirely *bona fide*, will be sustained in law.

Memorandum.—Replevin. In the Circuit Court of Pope County; the Hon. OLIVER A. HARKER, Judge, presiding. Declaration in replevin. Pleas (1) *Non cepit*. (2) *Non detinet*. (3) Property in defendant. (4) Property in stranger. (5) Plea of justification by sheriff under *fl. fa.* Trial by jury; verdict and judgment for plaintiff; defendant appeal. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, ROSE & SLOAN, ATTORNEYS.

Before partners can appropriate firm assets to pay an individual debt of one copartner there must be unanimous consent, otherwise such transaction is fraudulent as to firm creditors. 1 Bates on Partnership, par. 544, 559; 1 Lindley on Partnership, 2d Am. ed., par. 146, page 366; par. 316, page 727; notes to par. 146, pages 368 and 369; par. 172, page 417; Story on Part., 6th ed., par. 97, 94, 132, 133, note 2, page 238; Parsons on Part., 2d ed., pages 175, 183, 206, 212, 171, note 1; 176, 218, 219, 263, side page 185, also 192; Brewster v. Mott, 4 Scam. 378; Smith v. Andrews, 49 Ill. 28; Davis v. Blackwell, 5 Brad. 32; Buchanan v. Meisser, 105 Ill. 638; 1 Bates on Partnership, par. 435, also 184; 1 Parsons on Contracts.

APPELLEE'S BRIEF, THOMPSON & CROW, ATTORNEYS.

If the rights of partnership creditors were invaded, they can not assert their supposed rights in suit at law. They must resort to a court of equity. 2 Bates on Partnership, Sec. 1039; Church et al. v. National Bank, 87 Ill. 68, following leading case of Jones v. Yates, 9 Barnewell & Creswell, 532 (17 Eng. Com. Law 436), and Homer v. Wood, 11 Cush. 65; Hanchett v. Gardner, 37 Ill. App. 82; Rainey v. Nance, 54 Ill. 34; Halstead v. Shepard, 23 Ala. 558; 1 Story's Equity Juris. Sec. 675; Golden State and Miner's Iron Works v. Davidson, 73 Cal. 389.

Wallace v. Steagall.

The partner's lien is a right inhering in the partners themselves, and is personal to them. 1 Bates on Partnership, 540; Anderson's Law Dictionary, 752; Ladd v. Griswold, 4 Gilm. 25 (authorities); Hapgood v. Cornwell, 48 Ill. 64; McIntyre v. Yates, 104 Ill. 501; Singer v. Carpenter, 125 Ill. 119; Sigler v. Knox Co. Bank, 8 Ohio St. 516; Williamson v. Adams, 16 Brad. 564.

It may be parted with by sale outright, or by any act showing an intention to abandon the lien. Ladd v. Griswold, 4 Gilm. 36; Hapgood v. Cornwell, 48 Ill. 64; Williamson v. Adams, 16 Brad. 564; Goembel v. Arnett, 100 Ill. 42.

Partnership property may be taken by one member of the firm, by consent of the other members of the firm, and applied to the payment of his individual debts, although such consent and transfer would leave the firm and the individuals insolvent. Insolvency is not the test. Such a transaction would not be an infraction of any of the rights of partnership creditors, and this because the partners have parted with their right to have partnership property applied to payment of firm debts. Ladd v. Griswold et al., 4 Gil. 25; Hapgood v. Cornwell, 48 Ill. 64; Singer v. Carpenter, 125 Ill. 117; Allen v. Center Valley Co., 21 Conn. 130; Sigler v. Knox Co. Bank, 8 Ohio St. 516; Hanford v. Prouty, 133 Ill. 351; Williamson v. Adams, 16 Brad. 564; Hoffman v. Schoyer, 37 Ill. App. 461; Whitney v. Dean, 5 N. H. 249; Woodmansie v. Holcomb, 34 Kans. 35; Jones v. Lusk, 2 Met. (Ky.) 356; Shaeffer v. Fithian, 17 Ind. 463; National Bank of the Met. v. Sprague, 20 N. J. Eq. 13; McDonald v. Beach, 2 Blackf. 55; Schmidlapp v. Currie, 55 Miss. 597; Hanover Bank v. Klein, 64 Miss. 141; Marks v. Hill, 15 Gratt. (Va.) 400.

If the debt contracted by one of the partners be one of which the firm got the benefit and equitably should pay, a payment of it out of firm assets will be upheld. Bates on Part., Sec. 567; Givin v. Shelby, 5 Ohio St. 96; Walker v. Marine Nat'l Bank of Erie, 98 Pa. St. 574; Reeves, Stevens & Co. v. Ayers, *supra*; Miller v. Robinson Bank, 34 Ill. App. 469.

Fraud is never presumed, but must be clearly proved, and the burden of proving fraud is on him who alleges it. Hatch v. Jordan, 74 Ill. 414; Jewett & Root v. Cook, 81 Ill. 260; Pratt v. Pratt, 96 Ill. 184; Schroeder v. Walsh, 120 Ill. 403, and cases cited.

Vendors and vendees must both have participated in the fraud to invalidate the transaction; and *onus* is upon attacking parties. Hatch v. Jordan, *supra*; Gridley v. Bingham, 51 Ill. 153; Ewing v. Runkle, 20 Ill. 448; Myers v. Kinsey, 28 Ill. 36; Anderson v. Warner, 5 Brad. 416.

A purchaser from a partner, of joint assets, in taking such to pay an individual debt, is not bound to inform himself as to the authority of the partner to sell firm assets for the purpose. This is not the rule in Illinois. Hapgood v. Cornwell, 48 Ill. 64; Reeves v. Ayers, 38 Ill. 418; Goemmel v. Arnett, 100 Ill. 34.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellant, as sheriff, levied several writs of attachment upon a stock of goods, of which the appellee at the time claimed to be the owner and in possession. He sustained his claim on a trial in replevin. The appellant insists the evidence does not sustain the judgment. The suits in attachment were against Steagall & Co., the individual members of which firm were Thomas Steagall, Wm. Trubger and I. M. King. The first named member had the principal interest and was the active manager; the others had a small interest and took no part in the management of the business. The appellee had owned a large interest in the stock, but sold out his interest to Thomas Steagall, his son, on time. The new firm became embarrassed and the entire stock was sold to appellee in payment of his debt and in consideration of certain debts by him assumed. He took possession, and in a few days thereafter the sheriff made the levies alluded to. The firm was insolvent at the time of the sale, which was made by Thomas Steagall in his own name, and, as claimed, by the consent of the other members of the firm.

The appellant claims: 1. That an insolvent firm can not sell its property or dispose of it to pay private debts of individuals of the firm. 2. That the consideration of the sale in part was fictitious. 3. That Thomas Steagall had no authority from the other members to make the sale. These points will be considered in their order.

In the marshaling of assets, composed of individual and partnership property, partnership creditors have prior right to have their debts satisfied, to the exclusion of individual creditors, out of partnership property, with a right to the surplus, after satisfaction of individual debtors, of separate property. *Ladd v. Griswold*, 4 Gilm. 25. This right in the partnership creditor exists because of the right of the partners to so have the partnership property applied. *Singer, Ninnick & Co. v. Carpenter*, 125 Ill. 117.

It necessarily, therefore, follows, when that right ceases to exist in the partner, it does also in the firm creditor. As is said in the *Carpenter* case, *supra*, when the partnership property vests in an outside party, the interest of the partners in it is thereby terminated, and with their interest terminates that of the firm creditors. The lien of the partner is not a limitation upon the *jus disponendi*, and therefore the partnership creditor's lien can not be asserted or enforced after its exercise. The right of the partnership to dispose of all the firm property rests exactly upon the same right that each member has, to dispose of his individual property. *Hanford et al. v. Prouty et al.*, 133 Ill. 352. It can be sold by the firm to pay an individual debt of one of the partners or it may be disposed of by sale to one member in order that he may so sell or use it. *Hapgood et al. v. Cornwell et al.*, 48 Ill. 64; *Goembel et al. v. Arnett et al.*, 100 Ill. 34. Although sold to one partner with agreement that the property should be applied to the payment of partnership debts, yet this would not prevent a sale to and vesting of good title free from partnership lien in one who purchased without notice. *Hapgood* case, *supra*; *Porter v. Merritt*, 105 Ill. 299. The right of a firm to sell its property being as untrammelled as that of an individual to sell his separate

estate, it follows that as an individual may, though insolvent, sell his property to whomsoever he pleases, and thereby prefer creditors (Wood et al. v. Shaw et al., 29 Ill. 444, Bawden v. Bawden, 75 Ill. 143), so may a firm, though insolvent, sell its property to whomsoever it desires, though thereby the individual creditor of one partner is preferred to the exclusion of partnership creditors. Hanford v. Prouty, 133 Ill. 352; Goembel v. Arnett, 104 Ill. 34. Thus far we have discussed the legal question presented from the standpoint of Illinois authorities without reference to the facts as disclosed by the record.

In the original brief and argument of appellant much stress was placed upon this point, but in the reply argument it is said "the gravamen of the case at bar, is the fraud that was perpetrated." The fictitious consideration in the bill of sale is said to consist in this, that when appellee sold his interest in the store to his son, Thomas, in September, 1889, it was only \$1,348.45, whereas when the bill of sale was made December 20, 1890, it was \$1,958, which would make the consideration fictitious to the extent of \$609.55. The record shows that the interest of appellee was invoiced at the former sum before the stock was removed from Columbus to Golconda, after which time the appellee continued in the partnership for several months before his sale to Thomas Steagall. The invoice at the time of the sale, we do not find in the record. The appellee and his son, Thomas, both testified, however, that at the time of such sale, his interest amounted to the latter sum, \$1,958, and that an invoice was taken, showing that fact, upon which basis the sale was made. There was no attempt to contradict this evidence. It stands in this record unimpeached. Therefore, there was no fictitious consideration of \$609.55. After a careful examination of the evidence our conclusion is that King and Truebger authorized or consented before the fact to the sale of the firm property. It may be that it was not disposed of exactly in the way they anticipated, yet such fact would not affect the title of a purchaser in good faith; see Hapgood and Parker cases, *supra*. There is no evidence

Horrell v. Horrell.

that appellee knew of any limitations being placed upon the sale. He purchased in good faith, as appears by the evidence, without any other than the lawful purpose of securing his own debt, which was entirely *bona fide*. Doubtless the firm creditors would have done the same, had the opportunity been presented, and thereby placed appellee in the same position in which they are now. The individual and partnership debts were all *bona fide*, and therefore under the facts in this case, *qui prior est tempore potior est jure*. The judgment is affirmed.

Charles H. Horrell v. James V. Horrell.

1. CERTIORARI—*Requisites of the Petition*.—To authorize the issuance of a writ of *certiorari* to remove a cause from a justice of the peace into the Circuit Court for trial, the petition for the writ must set forth and show: 1. That the judgment before the justice of the peace was not the result of negligence in the party praying for the writ. 2. That the judgment, in his opinion, is unjust and erroneous, setting forth wherein the injustice and error consists. 3. That it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing.

2. CERTIORARI—*What is Not a Compliance with the Statute*.—It is not a compliance with the statute for the petitioner to state his opinion or conclusion merely. He must set forth and show the facts and permit the court to draw the conclusion therefrom. If he fails to do this as to either of the three specifications of the statute, or if the facts set forth as to either of those specifications appear insufficient to support the conclusion, the petition is fatally defective, and the order of the writ should be refused, or if granted tentatively, then the writ itself should be quashed by the Circuit Court on motion for that purpose made in apt time.

3. CERTIORARI—*Negligence Bars the Right*.—The law gives a plaintiff in justice's court the right before the trial is entered upon to have the defendant exhibit his account or state the nature of his set-off. In case of surprise he has the right to apply for a continuance. If he chooses to conduct his case without an attorney, he is chargeable with knowledge of his legal rights; and if he does not demand that the defendant exhibit his account, or state the nature of his set-off, and does not apply for a continuance, he will be guilty of such negligence as to justify the Circuit Court in quashing his writ of *certiorari*.

4. *CERTIORARI—Failure to Take an Appeal.*—Where a petition for a writ of *certiorari* does not show that the plaintiff intended to take an appeal, not praying an appeal when the judgment was rendered, but does show that, five or six days afterward, he started to the nearest attorney, a distance of ten miles, to get advice in regard to taking an appeal, that he was taken sick on the way and was under the constant care of a physician for two weeks, and was unable to return home for two weeks more, but does not show that he asked any one to procure an appeal bond for him, or that he was so sick as to forget his business, or to be unable to make an effort to have an appeal bond filed in apt time, *it was held* that the petition failed to show that an appeal could not have been taken in the ordinary way.

Memorandum.—*Certiorari* to bring up a case from a justice's court. Appeal from an order of the Circuit Court of Randolph County, quashing the writ; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

BRIEF FOR PLAINTIFF IN ERROR, HARTZELL & SPRIGG AND J.
B. SIMPSON, ATTORNEYS.

Plaintiff in error contended that the petition contained the requisites of the statute, to wit: That the judgment was not the result of negligence; that it was unjust, and that it was not in the power of the petitioner to take an appeal in the ordinary way. R. S., Chap. 79, Sec. 62, 75 and 76; *Dye v. Noel et al.*, 85 Ill. 290; *Lord et al. v. Burke*, 4 Gilm. 367; *Cook v. Hoyt*, 13 Ill. 144; *Otten v. Lehr*, 68 Ill. 64.

BRIEF FOR DEFENDANT IN ERROR, WM. M. SCHUWERK,
ATTORNEY.

In cases of this kind three facts must affirmatively appear from the petition, viz.:

1. That the judgment before the justice of the peace was not the result of negligence in the party praying such writ.

2. That the judgment is unjust and erroneous, setting forth wherein the injustice and error consists.

3. That it was not in the power of the party to take an appeal, in the ordinary way, setting forth particular circumstances which prevented him from so doing. R. S., Chap. 79, Sec. 76; *Murray v. Murphy*, 16 Ill. 275; *First Nat. Bank v. Beresford*, 78 Ill. 391.

The petition must show facts establishing petitioner's right under statute; general averments are not sufficient. *Russell v. Pickering*, 17 Ill. 31.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Charles H. Horrell sued James V. Horrell before a justice of the peace of Randolph county, for a balance of \$191.50 alleged to be due him. The defendant interposed a set-off by way of defense, and on December 23, 1891, recovered a judgment against the plaintiff for \$70.19. The plaintiff did not perfect an appeal from this judgment, but, on March 8, 1892, obtained an order from one of the judges of the Circuit Court for the issuance of a statutory writ of *certiorari*, whereby the cause was removed to the Circuit Court for trial. At the September term of the Circuit Court this writ was quashed and judgment was rendered in favor of the defendant for costs. The plaintiff has brought the record to this court, and now asks a reversal of the judgment of the Circuit Court.

To authorize the issuance of a writ of *certiorari* to remove a cause from a justice of the peace into the Circuit Court for trial, the petition for the writ must set forth and show: First. That the judgment before the justice of the peace was not the result of negligence in the party praying for the writ. Second. That the judgment, in his opinion, is unjust and erroneous, setting forth wherein the injustice and error consist. Third. That it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing. It is not a compliance with the statute for the petitioner to state his opinion or conclusion merely. He must set forth and show the facts and permit the court to draw

the conclusion therefrom. If he fails to do this as to either of the three specifications of the statute, or if the facts set forth as to either of those specifications appear insufficient to support the conclusion, the petition is fatally defective, and the order for the writ should be refused, or if granted tentatively, then the writ itself should be quashed by the Circuit Court on motion for that purpose made in apt time. *Starr & Curtis' Annotated Statutes*, Chap. 79, Sec. 76; *Murray v. Murphy*, 16 Ill. 275; *Russel v. Pickering*, 17 Ill. 31; *Clifford v. Waldrop*, 23 Ill. 336; *Harrison v. Chipp*, 25 Ill. 575; *First National Bank of Chicago v. Beresford*, 78 Ill. 391; *Darmstaedter v. Armour*, 17 Brad. 285.

The only allegations of the petition bearing upon the first and second requirements of the statute are the following: "Your petitioner further states that he was not aided by attorney or other counsel, and had no knowledge or information whatever, of any claim of defendant against him for board, amounting to \$120, and was wholly surprised by it, and was therefore unprepared with witnesses by whom he could prove its payment, and that upon another trial he expects to prove payment of it, and that he is not in any manner indebted to the said James V. Horrell, but that he is justly indebted to your petitioner." "And your petitioner further shows that he was not at that time, nor is he now in any manner indebted to the said James V. Horrell, and that said judgment is wholly unjust and erroneous." These allegations show affirmatively that if plaintiff in error had not been guilty of negligence, he could have secured time for the presentation of his defense. The law gave him the right, before the trial was entered upon, to have the defendant exhibit his account or state the nature of his set-off. In case of surprise, he had the right to apply for a continuance. Having chosen to conduct his case without an attorney, he is chargeable with knowledge of his legal rights; and not having demanded that the defendant exhibit his account or state the nature of his set-off, and not having applied for a continuance, he is guilty of such negligence as to justify the action of the Circuit Court in quashing the writ.

Nor do the allegations of the petition set forth such facts as show that the justice's judgment was either unjust or erroneous. The petitioner complains that he was unprepared with witnesses by whom he could prove payment of the defendant's account for board; but he does not allege that he could procure such witnesses, except argumentatively, which is certainly insufficient. He does not assert that the account for board has been paid, or that he could prove payment thereof. He does state that he expects to prove payment upon another trial; but he might expect to do this without any reasonable ground for his expectation to rest upon. The petition fails to meet the second requirement of the statute.

As to the third requirement, the petition is likewise defective. In each of the cases cited by plaintiff in error upon this point, the facts alleged show clearly an intention to take an appeal within the twenty days allowed for that purpose, and an effort to carry that intention into effect, which was defeated, however, by circumstances which the petitioner could not control in the exercise of a reasonable degree of diligence. In the case before us the petition does not show that the plaintiff in error intended to take an appeal. He did not pray an appeal when the judgment was rendered. Five or six days afterward "he started to the nearest attorney, a distance of ten miles, to get advice in taking an appeal of his case. He was taken sick on the way and was under the constant care of a physician for two weeks, and was unable to return home for two weeks more, or to transact any business till after the time allowed for taking an appeal had expired." What was his purpose in seeking an attorney? To get advice as to whether he should appeal or not. He had not as yet formed an intention of taking an appeal. He alleges that "he had no one;" that he did not "know of any one whom he could get who knew of his condition, or the facts, to procure an appeal bond for him." But he did not mention the subject to his physician, or to any attendant, nor did he request any one to procure a bond for him. He was rational and able to

execute a bond, for aught that appears in the petition to the contrary. Construing the petition, in matter of doubt, against the petitioner, who could have prevented all uncertainty and ambiguity by explicit statement, we are of the opinion that the petition fails to show that an appeal could not have been taken in the ordinary way. But if there should be any doubt on this point, there is none as to the non-compliance of the petitioner with the first two requirements of the statute. The judgment of the Circuit Court is affirmed.

L. D. Morrison v. The People ex rel. Cora Belle Richard.

1. **BILL OF EXCEPTIONS**—*When Presumed to Have Been Filed in Time.*—Where the record does not show that time was given to file bond and bill of exceptions nor that bond and bill of exceptions were filed in term time, if the bill of exceptions is signed by the judge, it will be presumed to have been presented and filed in apt time.

2. **JURY**—*Province to Determine Questions of Fact, etc.*—In cases where the evidence is conflicting, but there is sufficient to sustain a finding, the verdict will not be disturbed.

3. **IMPEACHMENT**—*Inconsistent Statements out of Court.*—A witness is not necessarily impeached because he has made statements out of court inconsistent with a portion of his testimony; such statements may be explained, and it is then for the jury to say at which time the witness told the truth.

4. **BASTARDY**—*Exhibition of the Child to the Jury.*—At the request of a juror the child was shown to the jury. It was not offered in evidence by the people. There was an effort made by the defense to prove the father to have been an Italian, and this perhaps justified the court in complying with the juror's request.

5. **PRACTICE IN APPELLATE COURT**—*Objection to Evidence.*—An objection that the jury were allowed to seal their verdict and separate without agreement of counsel, or direction of the court, can not be made for the first time in the Appellate Court.

6. **JUDGMENT**—*Form of, in Bastardy.*—A judgment in a bastardy proceeding was entered against the defendant for \$350, to be paid, \$100 April 1, 1893, and \$12.50 every three months until paid, and for cost. It was held that such a judgment is not forbidden by section 8 of Ch. 17, R. S., entitled Bastardy.

Morrison v. The People.

Memorandum.—Bastardy proceeding. Appeal from the County Court of Clinton County; the Hon. JESSE JONES, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

STATEMENT.

The defendant is a negro, his wife an octoroon, and their daughter, who testifies, is a mulatto. The prosecutrix has a taint of negro blood and is molded in Celtic cast. Genealogically speaking, she is one part negro to fifteen parts white; the wife of defendant and her mother are sisters. Her father was a thriftless white man, who early abandoned her.

VAN HOOREBEKE & FORD, attorneys for appellant.

M. P. MURRAY AND J. J. MCGAFFIGAN, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was a suit under the bastardy act, brought upon the complaint of Cora Belle Richard, charging that appellant is the father of her bastard child. The complaint was filed in justice's court November 30, 1892, and the cause was tried in the County Court, by a jury, at the February term, 1893, who, by their verdict, found that Cora Belle Richard is an unmarried woman; has never been married; that she has been delivered of a bastard child; that the defendant is the father of said child, and said child is now living.

Defendant filed his motion for a new trial, which was overruled and defendant excepted. The court entered judgment against defendant for \$350, to be paid to the clerk in installments of \$100, payable April 1, 1893, and \$12.50 every three months, until the whole amount is paid, and that defendant pay all costs. Defendant craved and was granted an appeal to this court, but no time was fixed for filing bond or bill of exceptions. Bond was approved by clerk and filed March 8, 1893, and bill of exceptions was filed March 4, 1893, and was signed by the judge. When the record does not show that time was given to file bond and bill of excep.

tions, nor that bond and bill of exceptions were filed in term time, if the bill of exceptions is signed by the judge, it is presumed to have been presented and filed in apt time. *Hyde Park v. Dunham*, 85 Ill. 569; *Myer v. Phillips*, 68 Ill. 269; *Underwood v. Hoosack*, 40 Ill. 98.

Without reproducing in detail all the evidence, we will now refer to and comment upon so much thereof as seems material. It is shown and not disputed, that the prosecutrix was about sixteen years old at the time the alleged sexual intercourse with defendant is charged to have occurred; and his family, with whom she was brought up, consisted of himself, his wife, two grown daughters and a son. That he took her in a buggy to stay with a Mrs. Beverly, his crippled and invalid sister. That he remained there two nights and one day, his sister sleeping in one room, and he and the prosecutrix in an adjoining room, in which she slept on a lounge and he on a bed both nights. That she remained there two months, and then he came for her and took her back to his home, where she stayed until the expiration of two weeks after her child was born, and then an aunt came and took her away. In addition to these undisputed facts the prosecutrix testified that on the second night at Mrs. Beverly's, she, the prosecutrix, retired first and had been asleep, when defendant came to her and had sexual intercourse with her on the lounge, and nothing was then said, except that she told him she would tell on him, and he replied she had better not, or he would make it hot for her. That defendant had never, before or since, said one word to her out of the way, or had sexual intercourse with her but that one time, and no other person but him ever had sexual intercourse with her. She also testified positively, that defendant was the father of her bastard child, and that she had never been married. Defendant testified that the head of his sister's bed was close to the door between the two rooms, which door stood open both nights he was there; that he and his sister sat up and talked both nights, until about eleven o'clock; that when he went to bed he did not go near the lounge, or speak to the prose-

cutrix, nor she to him; that he never said aught out of the way to her, nor had sexual intercourse with her; never thought of such a thing; would as soon have thought of doing it with one of his daughters as with her; that he is not the father of her child. On cross-examination he testified he made no inquiries about the peddler after he learned she charged the peddler with being the father of the child.

Defendant's daughter testified, when her attention was called to the condition of prosecutrix and she first asked the latter about it, she replied she had taken cold, but some time afterward said that when she was at Mrs. Beverly's an Italian foot peddler came there and fooled her, and was the father of the child she was then pregnant with. That he got the better of her the first Monday after she went there, and Mrs. Beverly was not at home; and after this she showed witness a breast pin and pair of ear rings, she said the peddler had given her. This witness testified before the justice, but did not then say it was an Italian peddler prosecutrix mentioned, but said it was a foot peddler; and the justice in rebuttal testified that on that occasion he don't think this witness said Belle told her it was on the Monday after she went to Mrs. Beverly's that the peddler overcame her. The prosecutrix testified before the justice that she told defendant's wife and daughter that a foot peddler was the father of her child, and on cross-examination in the Circuit Court, also testified, when she came back to defendant's in July, 1890, she did not have her menses, and defendant's daughter asked her what was the matter, and she replied that she got in the family way by a foot peddler while at Mrs. Beverly's, and told defendant's wife the same thing. On re-examination, she testified that what she had told them about being in the family way by a peddler was not true, and she told it because she wanted a home. That it was not until she had been at Mrs. Beverly's two or three weeks that a peddler came, and then Mrs. Beverly was there, and she also explained how she purchased the cheap ear rings and breast pin. It thus appears there was a sharp conflict in the evidence upon material points, and it was the province of the jury to determine what the real truth was.

If they believed the prosecutrix, defendant was guilty. If they believed him, he was not guilty. It is said her testimony ought to have been discredited because of her statements to defendant's wife and daughter; but the fact that she frankly admitted she had made them, both at the examination before the justice, and at the trial, and the reason given by her for making them, very properly influenced the minds of the jury favorably toward her. It is also said to be improbable, that as there was but one act of sexual intercourse, and she had never before had such intercourse, she could have become pregnant by defendant. But these facts were before the jury, and if they found them to be true, and that defendant did have intercourse with her, as she says he did, they were justified in finding as they did, that one act of intercourse was sufficient to produce such result. It appears, also, defendant occupied the same bed-chamber with prosecutrix and had the opportunity to do what she testified to, and the threat he then made, if the jury believed he made it, would deter her from charging him with the offense, until she had removed from his place. His conduct in making no inquiries and exhibiting no solicitude for her, when he was informed of her condition, doubtless had its effect with the jury in determining the question of his guilt and the weight his testimony was entitled to. A similar case to this is *Lewis v. The People*, 82 Ill. 104. It was urged that the verdict was not sustained by the evidence, and in the opinion it is said: "If the evidence of the prosecution was alone considered, it would not leave a doubt that defendant was the father of the child. It was for the jury to determine whether he had overcome the evidence on the part of the people, and they have found he had not, and we think correctly. It is true the prosecutrix made statements out of court inconsistent with a portion of her testimony, but she frankly, and without evasion, stated she had, and gave the statements as they were testified to by others, and gave reasons for so doing that seem to have been satisfactory to the jury, who saw her testify and had ample means of determining the weight

of all her testimony." See, also, *Holcomb v. The People*, 79 Ill. 409.

Upon examination of all the evidence in the record, we do not feel warranted in saying it does not justify the verdict. It was objected that at the request of a juror the child was shown to the jury. It was not offered in evidence by the people, and at what time it was exhibited does not very clearly appear. There was an effort made by the defense to prove the father to have been an Italian instead of defendant, and this, perhaps, justified the court in complying with the juror's request. Another point is made which is not assigned as error, viz., that the jury were allowed to seal their verdict and separate, without agreement of counsel, or direction of the court. It appears the jury retired in charge of an officer, and agreed upon the verdict, which was sealed up and delivered to him, then separated, but within ten minutes returned to the court room, counsel for both sides being present. The court asked the jury, all being present, if they had agreed upon a verdict; they replied they had, and handed up said sealed verdict, which the court directed the clerk to open and read, which he did, and the court then asked the jury if the verdict, as read, was their verdict in this case, and after severally replying it was their verdict, the court discharged them, said attorneys still being present and offering no objection. In this state of case, objection to receiving said verdict comes too late; and that it was the real verdict which had been agreed upon before the temporary separation, there can be no doubt. Improper remarks of counsel for the people, are suggested as sufficient grounds for reversal. But the remark made during defendant's cross-examination, while, perhaps, improper, was not of a character likely to prejudice defendant's case. And no ruling was asked for, or made by the court, touching the remarks of said counsel in the closing argument.

We concur with counsel for plaintiff in error that the jury ought to have been accurately instructed, and an examination of the whole series of instructions given by the court,

satisfies us the jury were instructed with sufficient accuracy to properly understand the law, and were not misled or misdirected to the injury of defendant. It is also contended that the judgment entered is so clearly erroneous in form that it must be reversed. By Sec. 8 of the bastardy act, if the issue is found against defendant, he shall be condemned to pay a sum not exceeding \$100 for the first year after the birth of such child, and a sum not exceeding \$50 yearly for nine years succeeding said first year. By this provision a judgment for as much as \$550 might lawfully have been entered against defendant, and if the judgment had been for that sum, inasmuch as no yearly installment after the first could exceed \$50, it would have been proper to make that sum payable annually in each year during nine years. But at the time this judgment was entered, more than a year had elapsed since the birth of the child, and the first installment, \$100, could have been ordered paid at once; yet two months' time thereafter within which to pay it, was allowed. The amount of \$12.50 ordered to be paid monthly until the remaining \$250 was paid, amounted to but a yearly installment of \$50, for each year, during a period of five years, payable in equal monthly payments, a method we do not understand is forbidden by the statute, but is in compliance with its provisions. We find no error requiring the reversal of the judgment and it is affirmed.

52	488
75	583
52	488
78	148
79	236
52	488
84	170
52	488
91	18

**St. Louis, A. & T. H. R. R. Co. v. James Reagan, a Minor,
who sues by his Father and Next Friend,
James B. Reagan.**

1. MINORS—*Suits by Next Friend—Bond for Costs.*—A court has power, upon a showing made, to allow a minor to prosecute a suit by his next friend, without such next friend giving a bond for costs.

2. MINORS—*Suits by Next Friend—Power of Court to Require Bond.*—A court is not required *sua sponte*, to compel the filing of the next friend's personal bond.

3. RAILROAD COMPANIES—*Right to Eject Trespassers from Trains.*—

St. L., A. & T. H. R. R. Co. v. Reagan.

A railroad company has no right to forcibly eject a person from its trains while in motion, because he is a trespasser thereon, and if such ejection is made in a wanton or willful manner, the company will be liable in exemplary damages. In such cases it is immaterial whether the relation of carrier and passenger does or does not exist.

4. COUNSEL—*Remarks of in Argument to the Jury.*—In order to assign for error improper remarks of counsel in arguments before the jury, objection must be made at the time. The question can not be raised by affidavit on the hearing of a motion for a new trial.

Memorandum.—Action for personal injuries. In the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Declaration in case; plea not guilty; trial by jury; verdict for plaintiff, \$3,000, and judgment; appeal by defendant. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

Plaintiff's instructions, the giving of which is assigned for error:

No. 1. If the jury believe, from the weight of the evidence, that James Reagan, the plaintiff, became a passenger on defendant's passenger train at the tank on defendant's railroad at Crab Orchard creek, on or about the 4th day of September, 1892, to be conveyed to Carbondale, and if you further believe that one Wisely, a brakeman in the employ of defendant's said passenger train, by force ejected plaintiff from said train while it was in motion, and while said plaintiff was on said train as aforesaid, and using due care for his personal safety as charged in the declaration, or any count thereof, then you should find the defendant guilty and assess the plaintiff's damages at whatever you believe from the evidence he has sustained, not exceeding, however, the sum of five thousand dollars (\$5,000).

No. 2. If the jury believe, from the weight of the evidence, that James Reagan, the plaintiff in this suit, was on defendant's passenger train on defendant's railroad, on or about the 4th day of September, 1892, and that plaintiff, while using due care for his personal safety, was forcibly ejected from said train by the brakeman thereon employed on said train, while said train was in motion, as alleged in the declaration, or any count thereof, then the jury should find the defendant guilty, and assess the plaintiff's damages at whatever you find he has sustained by reason of injuries received thereby.

No. 3. The court further instructs the jury: If you find the defendant guilty, then, in assessing the plaintiff's damages, you should take into consideration the value of his time lost, if any is shown by the evidence, in consequence of his injuries, and a fair compensation for his physical pain and suffering and any permanent or continuing disability, if the evidence shows any as alleged.

No. 4. If, from the evidence, you find the defendant guilty, that in

assessing damages for injury, if the evidence shows any has been received by the plaintiff, you may consider the value of the time lost, if any is shown by the evidence, in consequence of the injury, and a fair compensation for his physical pain and suffering; and if the evidence shows that the plaintiff has received an injury, which is permanent, or likely to exist for a great while, you may give damages for the future as well as the present disability.

No. 5. In determining the amount of damages which the plaintiff is entitled to recover in this case, if the jury find from the evidence, under the instructions of the court, he is entitled to recover any damages, the jury have a right to, and should take into consideration all the facts and circumstances in evidence before them; and they may consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses in this case; his pain and suffering, if any, resulting from said injuries; the permanent disability, if any, caused by said injuries, and any future pain or suffering, or future inability to labor, if any, that the jury may believe from the evidence the plaintiff will sustain by reason of injuries received, not to exceed \$5,000.

F. M. & D. V. YOUNGBLOOD, attorneys for appellant.

WILLIAM A. SCHWARTZ, attorney for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This suit was commenced by James Reagan, a minor, by his father, James B. Reagan, as his next friend, without appointment of the latter as next friend by the court, and without the filing of a bond for costs. Afterward appellant, the defendant in the court below, made a motion for an "order requiring the said James B. Reagan to give a good and sufficient bond for costs as required by the 18th section of the statute upon guardians and wards." Appellee made a cross-motion, asking the court to appoint and allow James B. Reagan to prosecute the suit as next friend without giving bond for costs, and presented an affidavit in support of the cross-motion, showing that the minor had a meritorious cause of action, and that neither he nor his father was able to give a good and sufficient bond for costs. The court sustained the cross-motion and overruled appellant's motion.

Appellant concedes that it was within the discretion of

the court to allow the suit to be prosecuted by the next friend without security for costs. C. & I. R. R. Co. v. Lane, 30 Ill. App. 437; same v. same, 130 Ill. 116. But it is contended that it was the imperative duty of the court to require the next friend to file his personal bond for costs.

We do not agree with appellant's counsel in this construction of the law.

We think the court had the power, upon the showing made, to permit the suit to be prosecuted without the giving of any bond whatever. However this may be, we are satisfied that the court did not err in overruling appellant's motion. The court was called upon to dispose of the motion as formulated by appellant, and not of some other motion which might have been made. The motion was to require the next friend to give a *good and sufficient bond*, which could mean nothing else, in view of the next friend's insolvency, than a bond with security. It is admitted that the court had power to overrule such a motion. Appellant's motion being out of the way, the court was not required *sua sponte* to compel the filing of the next friend's personal bond, and the order of the court sustaining the cross-motion was in no manner prejudicial to appellant. We find no error in the rulings of the court on these motions.

It is next urged that the verdict is against the evidence, and particularly that the damages are excessive.

About two or three miles east of Carbondale, at the time of the accident, there was a tank at which trains were accustomed to take water. While there was no ticket office at the tank, the right of the traveling public to take or leave the train at that point was recognized by the company. The fare to Carbondale was seven cents.

Nine hundred and forty feet west of the tank, the railroad passed over Crab Orchard creek on a trestle, which was from forty-five to fifty feet high. On the south side of the track, and but a few feet east of the trestle, was a white oak post set in the side of the grade so that the top of the post was on a level with, and about three feet from, the south rail of

the track. Attached to this post were barbed wires, which ran thence under the trestle.

The roadbed near the post was graded to a height of four feet, and was barely as wide at the top as a passenger coach. The track from the tank to the trestle was straight and comparatively smooth.

At 2:30 in the afternoon of September 4, 1892, James Reagan, who was eighteen years of age on that day, went upon the rear platform of the rear coach of a west bound passenger train, which had stopped at the tank for water. He sat down upon the platform, with his feet on the steps and his face toward the south, and was sitting thus, without holding to any part of the car for support, when the accident occurred.

When the train approached the white oak post near the trestle, it was running at the rate of thirty miles an hour, according to the testimony of the brakeman, Wisely. Four young men, Childers, Meyers and the two Robinsons, who were standing near the tank, with their view of the train unobstructed, saw a man, who proved to be the brakeman, come out of the rear of the coach, and lay his hand on Reagan's shoulder. Almost immediately thereafter, Reagan fell from the car. The brakeman went into the car and the train rolled onward to Carbondale. Wisely swears that as soon as the man went off, he pulled the bell rope, and that, having received no answer, he ran through the train and told the conductor. The conductor swears that he was so near Carbondale when he learned of the accident that he concluded to go on and make his connection with the Illinois Central. He stopped the train at the junction to register, he threw two switches, he ran to the depot, which was half a mile from appellant's road, and then sent the brakeman back to take care of the injured man.

In the meantime, the young men above mentioned, with Norbury, who had charge of the tank, but had not witnessed the tragedy, ran from the tank to the place where Reagan lay. The injured man's head had struck the post. Some of the barbed wire was wrapped around him. He

was bruised and cut in several places. He was unconscious and remained so till next day. He was taken to the home of his uncle; and when the brakeman arrived at the scene of the accident, it was to find that Reagan had received more timely assistance.

The brakeman swears that he went back to take up the slack in the bell rope; that he found a stranger on the platform and inquired where he was going; that he understood the man to answer Bethel or Belleville, and then advised him to get inside; that the man said he had no ticket—also that he had no money; that he (the brakeman) then told the stranger that he ought to have gotten off before the train got to going so fast; that thereupon the man jumped from the car, holding on with his right hand, and was dragged thirty or forty feet; that the train “jerked him, and his heels went up, and he swung around sideways;” and that he “hit the ground thirty or forty feet before he got to the trestle.”

Reagan swears that he had fifteen cents in his pocket, and was ready and willing to pay his fare; that the fare was not demanded; that he did not know the brakeman was there till he felt a hand on his shoulder; that the brakeman asked where appellee was going; that appellee answered “Carbondale;” that the brakeman said, “you had better get inside of the car;” that appellee answered that he was faring very well where he was sitting; that the brakeman put his foot or knee in the small of appellee’s back and shoved him off; that appellee “went over just like a wheel, head first,” and that his injuries were so serious as to render him unconscious until some time during the following day.

Life is certainly of more value than seven cents. If the brakeman shoved Reagan from the platform at this dangerous place, with the train running at a high rate of speed, the company is liable, even though Reagan was a trespasser. The brakeman knew the probable dangerous consequences of his act, for when he was asked if he got off the train when Reagan did, he answered that he did not, that he was not ready to die.

What is the fact? It is said to be beyond belief that the brakeman should have committed so fiendish a deed. Equally incredible is the other theory that Reagan jumped from the car. The question of a pure accident by falling is not presented, for of the two actors who know the absolute truth, one says Reagan jumped off, and the other says he was shoved off. What necessity was there for Reagan to incur the risk of jumping from the train? A rational being in his position would have had no fear of being hurled from a rapidly moving train for the non-payment of seven cents. The most serious calamity he could have anticipated would be the stopping of the train and ejection therefrom without danger to his person.

In any view of the case it is fully as incredible to assert that Reagan jumped from the train as it is to affirm that the brakeman shoved him from the train.

The young men who stood near the tank and witnessed the accident, saw the brakeman lay his hand on Reagan's shoulder. One of them says that the brakeman held to the railing at the end of the car with the other hand. This looks as if the gentleman was bracing himself for the application of force to the offender. The young men did not see a kick or a shove. Some of them think they would have seen a kick if force had been applied in that manner. They all swear, however, that Reagan might have been shoved without their cognizance of the act.

One of them swears, without objection, that he has a suspicion that Reagan was shoved off. While this is not proper evidence, it does have a tendency to show that the facts, as they appeared to the witness, were not inconsistent with the theory that Reagan was shoved from the train.

The following statement occurs in the testimony of the brakeman, as set forth in the abstract:

"I then told him he ought to have gotten off before the train got to going so fast."

Was the brakeman insisting that Reagan should get off? And was Reagan pleading that the train was going too fast? And was the brakeman urging that that was not a sufficient

excuse—that he should have gotten off sooner? Did the brakeman take Reagan for a tramp, who might be dealt with in a summary manner without fear of the consequences? He swears that there had been no trouble with tramps on that day, but admits that he might have said something about tramps on the former trial of this case. He does not deny that he regarded this man as a tramp.

All of the young men who witnessed the accident say that Reagan went directly forward from the platform.

There was no raising as if to jump. Childers and William Robinson say he went off with his head down. Does a man *dive* when he undertakes to jump from a rapidly moving train? Meyers says he went off head first—a summersault. Does a man practice turning summersaults under such unfavorable circumstances?

We can not readily understand how one sitting on the platform of a car, with his feet on the steps, could jump from the train without some preparatory movement.

The evidence shows clearly that no such movement was made.

We think the jury were justified in finding that the brakeman shoved or pushed Reagan from the train. This being true, there is no difficulty in disposing of the question of damages. The act of the brakeman was certainly wanton, willful and malicious. The jury were justified in giving exemplary as well as actual damages. In this view of the case the damages are not excessive. In fact, it appears from the testimony of this young man and his physician that the former has probably sustained permanent injuries such as will interfere materially with his ability to earn a livelihood by manual labor, which is his only means of support. We find no error in the assessment of damages.

We come now to a consideration of the instructions. Five were given for appellee. It is admitted that the fourth is free from error. All instructions asked by appellant were given without modification.

It is urged that appellee's first instruction is erroneous in submitting to the jury the question whether or not appellee

was a passenger. The first instruction given for appellant submits the same question to the jury and also defines the word passenger, and appellant is therefore estopped from saying that this was not a proper question for the consideration of the jury. Besides, appellee's instruction requires, as indispensable to a recovery, that the jury find from the evidence a forcible ejection of appellee from the train, while in motion, by appellant's brakeman. In such case it was immaterial whether the relation of carrier and passenger did or did not exist, as is admitted by appellant's first, fourth and fifth instructions.

It is also urged that the instruction is erroneous in stating to the jury that if they find the facts to be as supposed in the instruction, they *should* find for appellee. In such case we think the jury have no discretion in the premises. When the plaintiff proves all the facts necessary to entitle him to recover, it is the duty of the jury to find in his favor.

The foregoing remarks dispose of the principal objections to the second instruction. While the measure of damages is not stated in this instruction, it is stated in the third, fourth and fifth instruction.

It is not necessary, nay, it is hardly possible, to cover the whole case with one instruction.

The criticism on the third instruction is as follows: "The third instruction is erroneous because it tells the jury that if they find the defendant guilty, in assessing the plaintiff's damages they should take into consideration certain facts. This word *should* is tantamount to *must*, and should not have been used." According to this proposition if the evidence shows loss of time in consequence of the injuries received, and physical pain and suffering and permanent disability in consequence of the same injuries, the jury may or may not consider these facts in the assessment of damages. Surely this is not the law.

The fifth instruction is criticised, because it tells the jury that in the opinion of the court, the plaintiff is entitled to some damages. We do not so understand the language. The objectionable clause speak for itself. It is as fol-

Schuchman v. Commissioners of Highways.

lows: "In determining the amount of damages which the plaintiff is entitled to recover in this case, if the jury find from the evidence, under the instructions of the court, he is entitled to recover any damages, the jury have a right to, and should take into consideration all the facts and circumstances in evidence before them."

The next criticism is in the use of the word *about* in the following clause: "They (the jury) may consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses in this case." The clause means no more than that the jury may consider the nature and extent of the plaintiff's injuries, if any, concerning which the witnesses have testified. The instruction does not authorize the jury to go beyond the evidence, but expressly requires their findings to be based upon the evidence.

We find no substantial objection to any of the instructions in this case.

Finally, it is alleged that appellee's attorney abused appellant in the closing argument to the jury. It is admitted, however, that appellant made no objection at the time, but sought to raise the question by affidavit on the hearing of the motion for a new trial. This can not be done. The speech, if objectionable, should have been objected to at the time when it was delivered. *Wilson v. The People*, 94 Ill. 299; *Campbell v. The People*, 109 Ill. 565; *Chicago City Railway Co. v. Duffin*, 24 Ill. App. 28.

It may be observed also, that the trial judge does not certify that the speech in question was made. He simply certifies that on the motion for a new trial, an affidavit was filed affirming that such a speech was made.

The judgment of the Circuit Court is affirmed.

George Schuchman et al. v. Commissioners of Highways et al.

1. *CERTIORARI—Motion to Quash.*—A general motion to quash a writ of *certiorari* is in the nature of a general demurrer, and upon such motion no question of imperfection in the form of the petition arises.

2. *CERTIORARI—Sufficiency of Petition.*—A petition for a *certiorari* to review proceedings for the opening of a public highway, which alleges that the highway in question is on the line between the town of Bald Hill, in Jefferson county, and district 41, in Perry county; that the petition praying for its establishment was not presented to or acted upon by the joint board of the highway commissioners of the districts; that the joint board did not cause notices to be posted in each of the districts for ten days prior to the proposed meeting, to hear reasons for and against the laying out of the road; that the joint board did not have the proposed road surveyed or platted; that the highway commissioners of the town of Bald Hill pretended to act on the petition, and caused notices to be posted in said town, and the highway commissioners of district 41 pretended to meet and act with the highway commissioners of the said town, but that no copy of the petition was ever posted in Perry county; no notice of the meeting, to hear reasons for or against the laying out of the road, was ever posted in district 41; that the prayer of the petition for the laying out of the road was granted; that the damages of M. S. were assessed by a jury; that she took an appeal from the verdict to three supervisors of Jefferson county; that the supervisors, though summoned, did not act; that two supervisors of Jefferson county and a road supervisor of district 41 were then summoned to hear the appeal; that they refused to take jurisdiction, and pretended to dismiss the "cause" (evidently meaning the appeal); and that the commissioners of the town of Bald Hill are about to open the road, insisting that the same has been lawfully laid out; that the petitioners for the writ of *certiorari*, one of whom was a minor, were owners of lands taken for the road in question, and that their damages were not agreed upon, assessed or paid, and that no steps were taken to secure the relinquishment of the said minor's damages, is sufficient to require a return to the writ.

3. *HIGHWAYS—Opening on a Town or County Line.*—Where a public highway is to be laid out on a town or county line in counties under township organization, the petition must be presented to the commissioners of each town, and thereupon it becomes the duty of the commissioner of the two towns to meet and act as one body, in the same time and manner as in other cases, in considering the petition, viewing the premises, and making all orders in reference to such proposed road. A majority of all such commissioners must concur in all such orders. Such is also the law in counties not under township organization, with the additional requirement that a copy of the petition shall be posted in each district interested.

4. *HIGHWAYS—Posting Petition—Jurisdiction.*—Where, in opening a highway on a county line, the petition and notice required by law are not posted in one of the counties, no jurisdiction is acquired and all subsequent proceedings are void.

5. *HIGHWAYS—Proceedings to Establish, etc., Without Jurisdiction.*—Where the commissioners by reason of irregularities in their proceedings acquire no jurisdiction of the subject-matter, the fact that the par-

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ties interested had the right to appeal, and did not exercise that power, will not prevent them from having their remedy by a writ of *certiorari*.

6. HIGHWAYS—*Posting Notices in Proceedings to Lay Out*.—In proceedings to lay out a highway, the posting of notices of the time and place when and where the commissioners will meet to hear reasons for and against the laying out of the road, relates to the jurisdiction of the subject-matter and of the person. The failure to post the notices can not be cured in any manner whatever.

7. HIGHWAYS—*Commissioners Must Have Jurisdiction of the Subject-Matter*.—In proceedings to lay out a public highway, where the notices of the time and place of the meeting have not been posted as required by law, the commissioners have no power to proceed under any circumstances, even if every inhabitant of the town or district were present to act with reference to the subject-matter.

8. HIGHWAYS—*Appeal from Assessment of Damages*.—Where an appeal is taken from the verdict of the jury in assessing damages, such an appeal will suspend only so much of the order of the commissioners as affects the party appealing. It will not suspend the order of the commissioners laying out the road.

Memorandum.—*Certiorari* to review proceedings to lay out a highway. Error to the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

BRIEF OF PLAINTIFF IN ERROR, G. B. LEONARD, ATTORNEY.

The common law writ of *certiorari* may be awarded to all inferior tribunals and jurisdictions when it appears they have exceeded their jurisdiction, or in cases where they have proceeded illegally. *Gerdes v. Champion*, 108 Ill. 137; *People ex rel. Loomis v. Wilkinson*, 13 Ill. 660; *Commissioners v. Harper*, 38 Ill. 107.

These boards of commissioners at every step proceeded without jurisdiction or lawful right in attempting to lay out that road upon appellant's lands; the appeal of Mary C. Schuchman nullified any order made by the commissioners, and there being no order laying out this road by the three supervisors, filed by them with the town clerk, the road had not been legally laid out. *Pool v. Breese*, 114 Ill. 594; *Hyslop v. Finch*, 99 Ill. 183; *Deitrick v. Highway Commrs.*, 6 Brad. 70.

Failing to assess the damages or make compensation to the land owner in laying out a road, is not a mere irregularity, but renders the order for the road void. Cooley, Cons. Limitations; Marsh v. Chestnut, 14 Ill. 225; Smith v. C. A. & St. L. R. R. Co., 67 Ill. 191; Mitchell v. I. & St. L. R. R., 68 Ill. 286; Chicago & A. R. R. v. Smith, 78 Ill. 96.

BRIEF OF DEFENDANT IN ERROR, ALBERT WATSON, ATTORNEY.

We quote the first paragraph of plaintiffs in error's brief, adding the essential statement found in each of the authorities.

"The common law writ of *certiorari* may be awarded to all inferior tribunals and jurisdictions when it appears they have exceeded their jurisdiction, or in cases where they have proceeded illegally, and there is no appeal." Gerder v. Champion, 108 Ill. 137; Doolittle v. Galena & C. R. R. Co., 14 Ill. 381; People ex rel. Loomis v. Wilkinson, 13 Ill. 660; Commissioners v. Harper, 38 Ill. 107.

The converse of the proposition is, where an appeal lies the writ of *certiorari* at common law will not be awarded.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error presented a petition to the Circuit Court of Jefferson County, praying for a common law writ of *certiorari* to be directed to defendants in error, commanding them to certify to the said Circuit Court, the proceedings in relation to the laying out of a certain public highway on the line between the counties of Perry and Jefferson. Defendants in error made no return, but appeared and made a motion to quash the writ, which motion was regarded and acted upon as a demurrer to the petition.

The motion was sustained and the petition was dismissed. Plaintiffs in error ask a reversal of this judgment. The motion to quash is general and amounts to no more than a general demurrer. Therefore, no question of imperfection in the form of the petition arises on this record. If the petition is sufficient in substance to require a return to the

Schuchman v. Commissioners of Highways.

writ by the respondents, the court erred in quashing the writ and dismissing the petition.

The petition alleges that the public highway in question was on the line between the town of Bald Hill in Jefferson county and district 41 in Perry county; that the petition praying for the establishment of the road was not presented to or acted upon by the joint board of the highway commissioners of the districts; that the joint board did not cause notices to be posted in each of the districts for ten days prior to the proposed meeting, to hear reasons for and against the laying out of said road; that the joint board did not have the proposed road surveyed or platted; that the highway commissioners of the town of Bald Hill pretended to act on the petition and to cause notices to be posted in the said town, and the highway commissioners of district 41 pretended to meet and act with the highway commissioners of the said town, but that no copy of the petition was ever posted in Perry county; no notice of the meeting to hear reasons for or against the laying out of said road was ever posted in district 41; that the prayer of the petition for the laying out of the road was granted; that the damages of Mary C. Schuchman were assessed by a jury; that she took an appeal from the verdict to three supervisors of Jefferson county; that the supervisors, though summoned, did not act; that two supervisors of Jefferson county and a road supervisor of district 41 were then summoned to hear the appeal; that they refused to take jurisdiction and pretended to dismiss the "cause" (evidently meaning the appeal); and that the commissioners of the town of Bald Hill are about to open the road, insisting that the same has been lawfully laid out.

It is also alleged that the petitioners for the writ of *certiorari*, one of whom was a minor, were the owners of land taken for the road in question, and that their damages were not agreed upon, assessed or paid, and that no steps were taken to secure the relinquishment of the said minor's damages.

Jefferson county is under township organization, while Perry county is not. As to the questions involved here, however, the road law as to the two classes of coun-

ties is substantially the same. Where a public highway is to be laid out on a town or county line in counties under township organization, the petition must be presented to the commissioners of each town, and thereupon it becomes the duty of the commissioners of the two towns to meet and act as one body, in the same time and manner as in other cases, in considering the petition, viewing the premises and making all orders in reference to such proposed road. It is further provided that a majority of all such commissioners must concur in all such orders. Such is also the law in counties not under township organization, with the additional requirement that a copy of the petition shall be posted in each district interested. In each class of counties ten days' notice of the time and place fixed upon for hearing reasons for and against the laying out of the road must be given by posting notices thereof in three of the most public places in the town or district in the vicinity of the proposed road. No petition was posted in Perry county; no notice was posted in district #1. Therefore no jurisdiction was acquired and all subsequent proceedings were void. *Frizell et al. v. Rogers*, 82 Ill. 109; *Commissioners of Highways, etc., v. Hoblit*, 19 Brad. 259. This proposition is not denied by the defendants in error; but it is urged that the parties interested had the right to appeal and did not exercise that power, the attempted appeal being "void *ab initio*," and that for this reason they are not in a position to have the record reviewed on *certiorari*. Is this the law in a case where the commissioners acquired no jurisdiction of the subject-matter?

In *Commissioners of Highways v. Harper*, 38 Ill. 103, the Supreme Court affirmed the judgment of the Circuit Court, quashing the proceedings of the commissioners of highways in laying out a road, and held *certiorari*, and not an appeal to three supervisors, to be the proper remedy where the commissioners had no jurisdiction of the subject-matter. But it is said that this decision was made on the ground that the supervisors on appeal could not consider questions going to the jurisdiction of the commissioners over the sub-

ject-matter; that under the authority of Pool et al. v. Breese, 114 Ill. 594, an appeal may now be taken to the supervisors on the question of jurisdiction; and that the reasons for the decision in the Harper case having fallen, the decision itself has ceased to be authority. In our opinion the Supreme Court have not intended to hold that an appeal to three supervisors is the only remedy where the commissioners have attempted to lay out a road without jurisdiction of the subject-matter. In passing upon this very question in Frizell et al. v. Rogers, *supra*, the Supreme Court say:

“It can not be said appellee ought to have appealed, because the commissioners, having acted without jurisdiction, there was nothing to appeal from. An appeal pre-supposes, and, indeed, is a recognition of jurisdiction.” To the same effect are the following decisions of the Appellate Courts: Commissioners of Highways, etc., v. Hoblit, *supra*; Trainer et al. v. Lawrence, 36 Ill. App. 90; and Hammon v. Commissioners of Highways, 38 Ill. App. 237.

If it should be contended that the posting of notices relates to jurisdiction of the person and not of the subject-matter, it is sufficient to say that the decisions of the Supreme Court affirm the contrary, and that the failure to post the notices can not be cured in any manner whatever, while failure to acquire jurisdiction of the person may be cured by the appearance of the person. The commissioners have no power, under any circumstances, even if every inhabitant of the town or district were present, to act with reference to the subject-matter, unless the notices of the time and place of the meeting have been posted as required by law. Nor would the fact that Mary C. Schuchman attempted to take an appeal affect the decision in any manner. Her appeal was from the verdict of the jury in assessing her damages. Such an appeal would suspend only so much of the order of the commissioners as affected the party appealing. Pool et al. v. Breese, *supra*. It did not suspend the order of the commissioners laying out the road, even if the same was a valid order. It could not affect the petitioners here, who are

George Schuchman and the infant, Julia Schuchman, even though the latter appears by George Schuchman and Mary C. Schuchman as her next friends. We hold that the court erred in quashing the writ and dismissing the petition. The judgment is reversed and the cause is remanded for proceedings in conformity with this opinion.

**The St. Louis Bridge Company v. Sarah E. Fellows,
Administratrix of the Estate of Cyrus E.
Fellows, Deceased.**

1. **NEGLIGENCE—In Constructing Railroad Curves.**—It is negligence on the part of a railroad company to construct its track upon a curve without elevating the outside or depressing the inside track.

2. **NOTICE—Frequency of Accidents, When, etc.**—The fact that accidents are of frequent occurrence, by reason of a particular construction of a railroad track, is notice to the company that the track is in some way defective, and imposes a duty on the company to take steps to remedy the defect.

3. **RAILROAD COMPANIES—Duty in Constructing Tracks.**—The duty rests on a railroad company to exercise great care and a high degree of skill to make its track reasonably safe for the service to which it is to be applied, and such duty relates not only to passengers, but to servants or others who may be lawfully upon the road; this legal obligation does not impose the duty of providing an absolutely safe track or machinery; it is sufficient, if it is reasonably safe.

Memorandum.—Action for personal injuries. Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

Plaintiff's instruction, the giving of which is assigned for error :

The court instructs the jury that a railroad company is bound to exercise reasonable care to furnish safe machinery, road-bed, track and switches connected therewith; and that a person entering its employment has a right to presume that the company has discharged its duty in this behalf; and if the jury believe from the evidence that the road-bed and track and switch of the defendants, at the place and time of the injury

St. Louis Bridge Co. v. Fellows.

in question, were not properly constructed, and were unsafe for the purposes for which they were used by the defendants, and that the defendants had notice thereof before the injury, or by the exercise of reasonable care and diligence might have had notice thereof before said injury, and negligently failed to use ordinary care to make them reasonably safe, and that by reason thereof the deceased, Cyrus E. Fellows, without notice of such unsafe condition of said track and switch, while in discharge of his duty, with due care and caution, was, without fault, then and there injured, from which injury he, on the evening of the same day, died, and the plaintiff and next of kin have sustained pecuniary loss in their means of support, then the jury will find for the plaintiff, and assess her damages at such sum as they believe from the evidence to be just compensation for the pecuniary loss so sustained, not, however, to exceed \$5,000.

APPELLANT'S BRIEF, G. & G. A. KOERNER, ATTORNEYS.

The extent of the legal duty of the defendant in the premises, was to use ordinary care to provide a track that was reasonably safe and fit for the purpose it was intended to serve. Cooley on Torts, 557; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Chicago, R. I. & P. R. R. v. Lonergan, 118 Ill. 41; Con. Coal Co. v. Bonner, 43 Ill. App. 23; L. S. & M. S. R. R. v. McCormick, 74 Ind. 447; Payne v. Reese, 100 Pa. St. 306; Howd v. M. C. R. R. Co., 50 Miss. 178; King v. B. & W. R. R. Co., 9 Cush, 112; Samman v. R. R., 62 N. Y. 251; Friel v. Ry. Co. (Mo.), 22 S. W. Rep. 498; Potts v. P. C. & D. R. R., 2 L. T. (N. S.) 283.

-APPELLEE'S BRIEF, JESSE M. FREELS AND WM. P. LAUNTZ,
ATTORNEYS.

Sweeney, their track foreman, says he "constructed this track" about two years before, and that he "did not give the outside rail any elevation," and that no double or second rail was placed there to take the place of elevation on this curve; this track was thus dangerously defective in its construction; and the defendants had notice of these defects in their track, which were defects in construction, two years before the time of the injury, and were guilty of gross negligence in failing to remove them and make the track safe; and appellant having thus negligently failed to take

any steps to make this track safe, is liable for this injury, caused by its negligence. *Chicago, B. & Q. R. R. Co. v. Gregory*, 58 Ill. 273; *Whalen v. I. & St. L. R. R. and Coal Co.*, 16 Brad. 324; *Chicago & I. R. R. Co. v. Russell*, 91 Ill. 298; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Chicago & A. R. R. Co. v. Johnson*, 116 Ill. 206; *T., P. & W. Ry. Co. v. Conroy*, 68 Ill. 561; *North Pac. R. R. Co. v. Herbert*, 116 U. S. 647; *Chicago & N. W. Ry. Co. v. Swett*, 45 Ill. 201; *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9.

The instruction complained of presents the case fully and fairly under the law and the evidence, and as favorable to defendants as they could reasonably ask. It is the law. *Chicago & N. W. Ry. Co. v. Swett*, 45 Ill. 201; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 284; *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 168; *Wis. Cen. R. Co. v. Ross*, 142 Ill. 11; *Whalen v. I. & St. L. R. & Coal Co.*, 16 Brad. 323; *Ill. Cent. R. Co. v. Welch*, 52 Ill. 186; *Chicago & I. R. Co. v. Russell*, 91 Ill. 303; *Toledo, P. & W. Ry. Co. v. Conroy*, 68 Ill. 561; *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 109.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

Cyrus E. Fellows, appellee's intestate, was employed by appellant as a switchman, to work in its switch yard at East St. Louis, and, as averred in the declaration, on the 24th day of August, 1886, while in the performance of his duty with all due care, riding on the foot-board of a switch engine then being run or driven over a side or switch track in said yard, the said engine jumped the track at a curve therein, because of its improper construction, in that the outer rail was not elevated, by reason whereof deceased was forced to jump, or was thrown from the foot-board with such violence that he received injuries causing his death.

This suit was brought for the benefit of the next of kin, who, it is alleged, were deprived of their means of support by his death. There have been several trials of the case, resulting in favor of the appellee except in the one preceding this, wherein the jury found in favor of appellant under an instruction of the trial court so to do, upon which judg-

ment was rendered, which was reversed by this court for error in giving such instruction.

The court in its opinion then said "there was evidence, uncontradicted, tending to prove the negligence charged, and which the plaintiff was entitled to have considered by the jury. Counsel for appellees, in their printed brief, have referred to the opinion filed in this cause, and appearing in 39 Ill. App. 456, as decisive of the case now presented, and insist, if the views therein expressed are adhered to by this court, an affirmance of the judgment must result. It is sufficient, in reply to this suggestion, to say, in this record much additional evidence appears on behalf of plaintiff to support the charge that the track was not safely and properly constructed, not appearing in the former record."

The same opinion is again printed in the appellant's brief and the position taken that the evidence, in this record, is substantially the same as that upon which the said opinion was based. While it is true that the evidence is of the same general tenor as before, yet we believe that the evidence of the plaintiff was much strengthened at the subsequent trial.

It is not disputed that Fellows, at the time of his injury resulting in death, was in the strict performance of duty in riding on the footboard of the engine, and that he was observing due and proper care for his own safety. There is no question of contributory negligence in the case.

The sole issue of fact is, was the appellant negligent in the construction and maintenance of its track?

It is admitted there was a curve in the track, of about fourteen degrees, where the engine jumped it, and that the outer rail was not elevated nor the inner one depressed. In other words, the track on that curve was constructed flat.

The evidence clearly shows a curved track should not be so constructed, if it can be avoided. It also shows that such construction was the cause of the engine, on which the deceased was riding at the time of the accident, leaving the track. No other cause is assigned. Other engines and cars jumped that track before and after this accident near the

same place. Bennett, appellant's switchman, testified that to his knowledge two engines had jumped off there; Coomer, that he had helped put an engine on there. The engine causing the accident, when placed back on the track, when started again, climbed the rail at the same place. The engine was in good order. Haker, another switchman, testified that two cars got off the track near that place a day or so before the accident. Assuming that the appellant had in the first place employed a competent and skillful man to construct this and the other tracks in that switch yard, certainly these frequent accidents gave notice that this track, for the purpose to which it was applied, was in some way defective, which imposed the duty on appellant to take steps to remedy the defect. The general theory of construction, at the time, may have been practical for the use of ordinary engines, but the evidence impresses the mind that this flat track, with a fourteen degree curve, was not suitable for possibly larger and longer engines and cars than the ordinary. The engine on the footboard of which Fellows was riding was a six wheeler and weighed 73,300 pounds. The length of the engine and tender was sixty feet, as sworn to by one of the appellant's witnesses. Whether the various displacements on this track are to be attributable to this cause or not, there necessarily must have been some ascertainable cause.

The jury found it was the want of proper construction. The evidence shows a slight elevation of the outer rail or like depression of the inner rail, would have made the track reasonably safe. While there is a conflict of evidence as to its practicability, yet with the curve all one way, apparently competent civil engineers affirm it could readily and should have been done. As one testified, not to do so was to sacrifice safety to convenience. The duty rested on the company to exercise great care and a high degree of skill to make its track reasonably safe for the dangerous service to which it was applied. C., B. & Q. R. R. Co. v. Gregory, 58 Ill. 284; Wis. Cent. R. R. Co. v. Ross, 142 Ill. 14. Considering the dangerous service, it was held in the case of C. &

A. R. R. Co. v. Shannon, 43 Ill. 345, that the railroad company was required to exercise the highest degree of vigilance.

In the C. & N. W. R. R. Co. v. Swett, Adm., 45 Ill. 203, it was held that such duty related not only to passengers, but to servants or others who might be lawfully upon the road.

This legal obligation does not impose the duty of providing an absolutely safe track or machinery. It is sufficient if it is reasonably safe. C., R. I. & P. R. R. Co. v. Loneragan, 118 Ill. 49. In this case it is said the law imposes the obligation on the company to use reasonable and ordinary care and diligence to so provide its servants. This language is not inconsistent with that used in the Shannon and Gregory cases, *supra*. The result to be attained is reasonable safety, considering the consequences of a failure therein.

The care and skill required by law must measure up to that standard, whatever may be the degree. Our conclusion is that there was evidence before the jury justifying the finding that the track at the place of the accident was not reasonably safe, and that the appellant had not exercised that ordinary care and skill that should pertain to such work to make it so.

The court gave one instruction for appellee, which counsel for appellant say, "While it may contain a correct abstract proposition of law, it misled the jury because there was no evidence to base it on." It is subject to some criticism, but not that made by counsel, if our conclusion upon the evidence is correct. When the entire instruction is considered, especially in connection with those given for appellant, it could not have misled the jury as to the duty imposed by law upon appellant. There being no material error in the record affecting the merits of the case, the judgment is affirmed.

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159a	168

St. Louis, A. & T. H. R. R. Co. v. Newton C. Barrett.

1. **NEGLIGENCE—Liability for Acts of Servants.**—Appellee, a conductor in the employ of the Illinois Central Railroad Company, was injured while obeying the order of his superior to get out of the way of a passenger train then overdue, by a collision with a train in charge of a crew of the appellant who were violating an explicit order of the same superior, directing them to move back out of the way and make room for appellee's train. *It was held* that he was entitled to recover.

2. **PRACTICE IN APPELLATE COURT—Abstracting Instructions.**—A single isolated instruction printed in the abstract is not in compliance with the practice in the Appellate Courts.

3. **PRACTICE IN APPELLATE COURT—Instructions to be Considered as a Series.**—Instructions must be considered as a series. The Appellate Court must know what instructions were given, as well as refused, before it can be intelligently determined whether or not the lower court has committed error in refusing an instruction. *

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Perry County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1898, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

R. W. S. WHEATLEY, attorney for appellant.

I. R. SPILMAN, attorney for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages for a personal injury. The evidence in this case may be said to fairly establish the following state of facts: That the appellee, as conductor of a freight train of the I. C. R. R. Co., was ordered by the man in charge of the yards and station at Du Quoin, to back his train on track No. 4, in order to clear the way for passenger train then past due, and that switching crew of appellants then engaged in taking cars from said No. 4, was also ordered to move back out of the way of appellee's train; that there were cars on No. 4 that the

switching crew desired to take out, which were between the two engines or trains when this order was given, and that the switching crew did not promptly comply with the order, but with knowledge of appellee's train backing up, and driving back the cars such crew was after, attempted to move away slowly, but only at such speed as would enable them to catch such cars, and then endeavor to couple them as they were thus driven upon them, when finally, owing to such management, appellee's train overtook the slowly receding train of appellant, resulting in the telescoping of the north loose car into the caboose of appellee's train, on the rear platform of which he was standing, causing the death of the rear brakeman and the serious injury of appellee.

The appellee, when injured, was obeying an explicit order of his superior to get out of the way of a passenger train, then overdue, while the crew of the appellant was violating an explicit order of the same superior, who had directed them to move back out of the way, and make room for appellee's train. Had they obeyed the order no collision would have occurred. Denton Plumlee, who testified for the appellant, says: "When the short line engine came up to where those cars (the loose cars) were, Mayer, the Illinois Central yard master, ordered them to go south on No. 4 track, and get out of the way of number 23. They dropped back and did not take the car they were after." Odum, who also testified for appellant, says: "They commenced to back in on us, and we commenced to move south. I was trying to make the coupling; they had shoved the cars back on us. I was walking with my shoulders between the cars, trying to make the coupling, both moving the same way."

It is evident that the switch engine crew's purpose was to get the car, so to speak, on the run, with the hope and expectation doubtless that they could also get out of the way of appellee's approaching train. It is clear this crew could readily have moved out of the way had they obeyed orders. In thus disobeying a positive order they caused the collision, resulting in a very serious injury to appellee.

The evidence does not show that appellee's train was

backing at unusual speed, for Plumlee, appellant's witness, testified that on his signal the engineer slackened the speed, which caused the loose cars, which had been reached by the caboose, to drop away so that the rear brakeman could not make the coupling; that the signal was given by Mayer, the superior over both crews, to back down again. The evidence does not show, in our judgment, that the appellee was negligent in the management of his train.

There was no error committed by the court in refusing the instruction of appellant, complained of. All that was valuable in it to appellant had been given in other instructions. This court again desires to warn counsel, that a single isolated instruction printed in the abstract is not in compliance with the practice in Appellate Courts.

The refused instruction alone was printed in this case. Lawyers well understood that instructions must be considered as a series, and that Appellate Courts must know what instructions are given, as well as refused, before it can be intelligently determined, whether or not the lower court has committed error in refusing an instruction. In this case, however, we have examined the record.

The principal complaint in this case is, that the evidence does not support the verdict. For reasons above stated we think it does, and the judgment is affirmed.

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156s 243

William Tipton v. The People of the State of Illinois.

1. INTOXICATING LIQUORS—*Construction of Statute.*—Sec. 1 of the act to regulate the sale of intoxicating liquors outside the incorporated limits of cities, towns and villages, approved May 4, 1887, in its plain meaning and intent is to prohibit the sale of such liquors outside the limits of cities, towns or villages, in less quantities than five gallons, except in the original package as put up by the manufacturers, and each package must contain five gallons or more.

Memorandum.—Indictment for unlawfully selling intoxicating liquors. Appeal from the Circuit Court of Clay County; the Hon. CARROLL C.

Tipton v. The People.

Boggs, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

GERSHOM A. HOFF and ALONZO HOFF, attorneys for the appellant.

H. W. SHRINER, state's attorney, for the people.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellant was indicted for and tried and convicted of violating the provisions of Sec. 1, Chap. 43, 3d Starr & Curt. Stat. 237. The indictment contained two counts. Defendant filed his motion to quash both. The court quashed the second count and overruled the motion as to the first, which charged defendant, not then and there having a legal license to keep a dram shop, with selling intoxicating liquors in less quantity than five gallons, and not in the original package as put up by the manufacturer, and the said place where said intoxicating liquor was sold, not then and there being within the incorporated limits of any city, town or village.

The cause was tried by a jury and the people introduced a witness by whose testimony it was proved that appellant sold him intoxicating liquor in less quantity than five gallons, and not in the original package as put up by the manufacturer, and that said sale was so made in Clay county, Illinois, at a place not within the incorporated limits of any city, town or village. No other evidence was introduced. The jury found defendant guilty as charged in said first count, and the court sentenced defendant to pay a fine of \$50, and entered judgment against him for the amount of fine and costs. The only question in the case is, what construction should be given said Sec. 1? It is in the following language:

“Whoever shall, outside of the incorporated limits of any city, town or village, by himself or another, either as principal, clerk or servant, directly or indirectly, sell, barter or

exchange, or in any manner dispose of, for money or anything of value, any intoxicating liquor of any kind, in any less quantity than five gallons, and in the original package as put up by the manufacturer, shall, for each offense, be fined," etc.

On behalf of appellant it is contended that to constitute an offense in violation of the provisions of this section, when they are properly construed, and warrant the conviction of a person indicted for such violation, it is essential to allege in the indictment, and prove that the intoxicating liquor sold by defendant, was, when sold, *in the original package* as put up by the manufacturer. Hence, the allegation in said first count being that the intoxicating liquor when sold by defendant *was not* in such original package, no offense was charged; the court erred in refusing to quash that count, and the conviction of appellant was unlawful. In the case of *Jackson v. The People*, 36 App. Ct. Rep. 53, we give our construction of this section and the reasons supporting that construction, and hold that its plain meaning and intent is to prohibit the sale of intoxicating liquor outside of the limits of a city, town or village, in less quantities than five gallons, except in the original package as put up by the manufacturer, and such package must contain five gallons or more. We are entirely satisfied with the conclusion reached by us and the reasons given in that case, and shall adhere to the opinion therein expressed until advised to the contrary by our Supreme Court. In this case we hold said first count in apt words charged a violation of said section by appellant; that the evidence established his guilt, and that he was lawfully convicted of the offense charged. The judgment is affirmed.

John J. R. Patrick v. James L. Perryman.

1. PRACTICE IN APPELLATE COURT—*Error in Rejecting Evidence*—Where evidence offered is objected to by the adverse party and the objection sustained, in order to assign the rejection of such evidence for error, an exception must be taken to the ruling of the court, and the evidence

Patrick v. Perryman.

offered must be shown by the bill of exceptions so that the Appellate Court can determine the materiality of it.

2. *PRACTICE—Opening a Case for Further Evidence.*—A trial court is not required to open a case after it is closed, for further evidence, without a showing that the evidence will enlighten the court as to the issues, or that the party could not procure the evidence upon the trial of the case.

3. *DENTISTRY—When the Six Months' Limitation Begins to Run.*—The act to regulate the practice of dentistry was approved on May 30, 1881, and went into effect on July 1, 1881. It provided that every person engaged in the practice of dentistry in this State, should cause his name and residence or place of business to be registered with the board of examiners within six months from the date of the passage of the act. *It was held* that the word "passage" refers to July 1st and not to May 30th, the date of its approval, and that the six months' limitation commences to run on July 1st.

4. *DENTISTRY—Compliance with the Law Essential.*—A person not being a registered dentist, under the law regulating the practice of dentistry, is not entitled to collect for his services in the practice of dentistry.

Memorandum.—Assumpsit. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

N. NILES, attorney for appellant.

WILLIAM WINKELMAN and JAMES M. HAY, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee before a justice of the peace for \$52 alleged to be due him for services as a dentist, and recovered the full amount claimed. On the trial of the case without a jury on appeal in the Circuit Court, a judgment was rendered in favor of appellant for \$17, and it was ordered, on motion of appellee for an apportionment of the costs, that each party pay his own costs. Appellant brings the cause to this court and assigns six errors for our consideration.

1. The Circuit Court erred in admitting in evidence a "written unsigned memorandum in the handwriting of a 'young lady,' and in the words 'Paid Dr. Patrick \$20 to-day'" (page 15, line 24). The record shows that such a writing was offered, but does not show that it was admitted in evidence. An exception is certainly unavailing when the court has made no ruling to which the exception can attach.

2. The court erred in refusing to "inspect the books of account of plaintiff, containing all the dealings between the parties herein, before judgment rendered, and after argument of counsel and submission of the cause to the court sitting as a jury. The record shows that the books of account were not offered in evidence, but that some days after the evidence and arguments had been heard and the cause submitted for decision, appellant offered, in open court, to submit his account books to the court for inspection. The refusal of the court to inspect the books is complained of as error, and yet there is nothing in the record to show in what manner the books would have enlightened the court as to the issues, or that appellant could not have offered the books in evidence upon the trial of the case. The court was not required to open the case for further evidence without a showing and no showing whatever was presented.

3. The court erred in "overruling plaintiff's motion for a new trial." Inasmuch as no exceptions were taken to the rulings of the court in admitting or excluding evidence, and no propositions of law were submitted to the court to be held or refused, there is nothing to consider under this head, but the sufficiency or insufficiency of the evidence to support the findings of the court. The evidence upon the trial was conflicting. Appellee claimed that he had made certain payments for which appellant refused to credit him. The result depended chiefly on which of the parties was entitled to credence. We can not say that the court, who saw the witnesses and heard them testify, erred in finding that the payments had been made and that appellee should have credit for them.

4. The court erred in "refusing to allow interest on the

judgment rendered, as for money withheld by an unreasonable and vexatious delay of payment." The evidence shows that appellant demanded \$52, and that this was \$35 more than he was entitled to. The refusal to pay an excessive amount was neither an unreasonable nor a vexatious delay of payment, and interest was properly disallowed.

5. The court erred in "refusing to allow ten per cent on said judgment as damages, for that the appeal to the Circuit Court from the justice of the peace was prosecuted for the purpose of delay." If the finding of the Circuit Court is correct, the appeal was not prosecuted for delay, but for the purpose of reducing the judgment to a proper amount.

6. The court erred in "so apportioning the costs of suit as to make the plaintiff pay all the costs by him expended in this behalf." Appellant states in his argument that he was required to pay \$18.20 and appellee \$6.05 of the costs. Assuming this statement to be correct, we find no error in the order of the trial court. The ratio of these amounts is about three to one. The ratio of the judgments is about the same. The judgment of the justice was not wholly affirmed or reversed, but was affirmed in part, and so the Circuit Court was empowered to divide the cost between the parties according to the justice of the case. Hurd's Stat., Chap. 33, Sec. 20. We think that the apportionment was fairly and justly made. This disposes of the assignment of errors on the part of appellant. Appellee, on his part, has assigned the following cross-error: "The Circuit Court erred in rendering judgment in favor of appellant when appellant has not shown that he was registered as a dentist as provided by law." The act to regulate the practice of dentistry was approved on May 30, 1881, and went into effect on July 1, 1881. This act provided that every person engaged in the practice of dentistry in this State should cause his name and residence or place of business to be registered with the board of examiners within six months from the date of the passage of the act; also that those not registered within such period of six months should not be permitted to practice dentistry until

duly examined and regularly licensed. The record shows that appellant caused his name and place of business to be registered on December 26, 1881. If the six months allowed for registration began when the act went into effect, appellant was registered in time. If the six months began when the act was approved, he was not registered in time and can not collect his fees by suit. *City of Chicago v. Honey*, 10 Bradw. 535. What is the meaning of the language, "Within six months from the date of the passage of this act?"

The formula used when a statute is passed with the emergency clause is no guide in the interpretation of the above language when used in the body of the enactment. The very object of the emergency clause is to put the statute into immediate operation, and the word *passage* in such case refers, *ex necessitate rei*, to the time of the governor's approval of the law. In cases where such a necessity does not exist, but where, on the contrary, a rational construction of the law demands another definition of the word, such definition should be freely given to carry out the intention of the legislature. The object of the allowance of six months for registration was to give those who were engaged in the practice of dentistry a reasonable period of time after the law should take effect within which to adjust themselves to the new state of things. No dentist was bound to take notice of the law till it became operative, and the period fixed for compliance with the provisions of the law would be supposed to begin at that time. To say that it began when the law was approved would involve the absurdity of saying that the legislature allowed four months and twenty-nine days (from July 1st to November 30th) after the law went into effect, within which to comply with its terms. The first section of the act provided that it should be unlawful for any person who was not engaged in the practice of dentistry in this State *at the time of the passage of the act*, to commence such practice except under the circumstances specified in that section. Can it be supposed that it was the intention of the legislature to give this law a retrospective action—to say to the dentist, you shall not

practice dentistry, because you did not obtain your diploma more than one month before this law became operative? We think not. The word "passage" in our judgment refers to July 1st, and not to May 30th. Authority for this construction of the act is found in *Endlich on the Interpretation of Statutes*, Sec. 181, and *Harding v. The People*, 10 Col. 387. In the *Harding* case the appellant had been tried and convicted for practicing medicine without a certificate from the State board of medical examiners. In reversing the judgment the Supreme Court say: "Our attention is also called to Sec. 5 of the act, which provides that the State board of medical examiners, within ninety days after the passage of the act, shall receive through its president, application for certificates and examinations. In this connection we are cited to Sec. 19, Art. 5, of the Constitution, which provides that no act shall take effect until ninety days after its passage, unless in case of emergency. In the absence of any emergency clause, in view of this constitutional provision the expression, "after the passage of the act," as used in the law, can have but one meaning, viz., after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative." We conclude that appellant was registered as a dentist within the time required by law, and that he is entitled to collect such amounts as he may have earned in the practice of dentistry. The judgment is affirmed.

St. Louis, A. & T. H. R. R. Co. v. James A. Odum.

1. EVIDENCE—*What is Not Negative Proof.*—Upon the issue as to whether the bell of a locomotive engine was rung at a highway crossing as required by law, the evidence of witnesses whose opportunity to see and know was such as to entitle their testimony to great weight, was, that the bell was not rung, so far as they heard. *It was held* not to be negative testimony in the sense that it was the testimony of witnesses who did not know whether or not a bell was rung.

2. RAILROADS—*Ringling the Bell at Highway Crossings, etc.*—The giv-

52	519
156s	78

52	519
67	363

53	519
80	520

52	519
92	*221

ing of four or five blasts of the locomotive whistle, or ringing of the bell for less than eighty rods before the reaching of the public crossing, is not a compliance with the law. The law requires that the whistle on the locomotive must be sounded eighty rods from the crossing and kept continuously sounding until the engine reaches the crossing, or the bell on the engine be rung eighty rods before reaching the crossing and kept continuously ringing until the engine reaches the crossing.

8. *INSTRUCTIONS—Assessment of Damages.*—An instruction which tells the jury to assess the plaintiff's damages at any sum they believe him entitled to from the evidence, is properly given.

4. *INSTRUCTIONS—Duty and Liability in Operating Trains.*—An instruction which informs the jury, if they believe from the evidence that plaintiff was free from negligence, and the defendant's servants were guilty of negligence in running a train over a crossing at a greater rate of speed than was usual or reasonably safe to persons about to cross the track, and that by reason of such neglect plaintiff was injured and damaged, he is entitled to recover, states the law correctly as to the duty and liability of appellant in operating its train, and submits the question of negligence to the jury, as a question of fact to be determined by them from the evidence.

5. *RAILROAD COMPANIES—Speed of Trains.*—While it is true the law does not limit the rate of speed at which railroad trains may be run in approaching highway crossings, outside of incorporated cities and towns, to a certain number of miles per hour, yet there is a duty imposed upon railroad companies to operate their trains with due regard to the safety of those traveling along the highway over such crossings. They are not to recklessly or carelessly run their trains at such a high rate of speed when approaching a highway, as to endanger the safety of travelers. They are to use reasonable care in running, managing and controlling their trains, with respect to speed, to avoid collisions at such crossings.

6. *NEGLIGENCE—Degrees of Care and Diligence.*—The degree of diligence required of such corporations in performing their duty, depends upon the circumstances of each case, and must be a degree of diligence amounting to reasonable care.

7. *NEGLIGENCE—What Will Support a Finding.*—The fact that a railroad train in approaching a highway crossing was running at a speed of thirty miles an hour, in violation of rules known to those in charge and control of the train limiting the maximum rate of speed to twenty miles an hour, that the crossing was much traveled by the public, also known to those in charge and control of the train, that at the time of the accident there was much dust upon the highway obscuring the view, and that there were obstructions preventing a person approaching the crossing on the highway from seeing far up the railroad track, will support a finding that defendant was guilty of negligence in running its train at a high rate of speed.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Williamson County; the Hon. ALONZO K. VICKERS, Judge, pre-

St. L., A. & T. H. R. R. Co. v. Odum.

siding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

CLEMENS & WARDER, attorneys for appellant.

YOUNG & BAKER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellee to recover damages for personal injuries. The declaration contains two counts. In the first count the negligence charged is, that "the defendant then and there, by its servants, were carelessly and improperly driving and managing the said locomotive engine and caboose, by then and there running the said engine and caboose at a high and unreasonable rate of speed along said railroad, and the said defendant, by its servant aforesaid, was carelessly, improperly and negligently driving and managing said locomotive engine and caboose along on the said railroad near to the said crossing, by then and there allowing and permitting said engine to assume such a high rate of speed as to become dangerous, and uncontrollable by the said servants of the defendant who were so managing and running said engine, and that by and through the neglect and improper conduct of the defendant, by its servants in that behalf, the said locomotive engine and caboose then and there ran and struck with great force and violence against the said wagon, whereby the plaintiff was then and there thrown with great force and violence to and upon the ground." Then follows the averment of the resulting injuries to plaintiff.

The negligence charged in the second count, is failure to ring the bell or sound the whistle on the engine continuously, when approaching the crossing, as required by the statute, by reason of which neglect it is averred the collision with plaintiff's wagon occurred, and the injuries to him resulted. To this declaration defendant pleaded the general issue and the trial resulted in a verdict finding defendant guilty, and

assessing plaintiff's damages at \$2,000. Defendant's motion for a new trial was overruled and judgment for the said amount and costs was entered. The plaintiff was riding in a wagon drawn by a yoke of oxen along the public highway toward the town of Mazon, and while in the act of crossing defendant's track at a point about one hundred and fifty yards outside of the corporate limits of Mazon, and where said highway crossed the track, defendant's train, consisting of an engine and caboose, coming down the track from the north, struck the wagon about the center; plaintiff was thereby thrown some distance and fell upon the ground, sustaining serious injuries.

A careful examination of the evidence in the record satisfies us the jury were fully warranted in finding defendant guilty of the negligence charged in the second count of the declaration; that such negligence caused the accident and injury to plaintiff; that he was in the exercise of reasonable care for his personal safety, when approaching and attempting to cross the track of defendant's road at the time he was injured, and that the damages assessed were not excessive. It is said, however, on behalf of appellant, that positive evidence established the fact of ringing the bell as required by the statute, and the evidence introduced by appellee to prove the averment that no bell was rung nor whistle was sounded on the engine continuously, as required by the statute, was negative in its character and not entitled to the same weight as positive evidence. On behalf of appellant, Higgins, the fireman, Webster, the engineer, Gilbert, the conductor, and Strong, the brakeman, testified the bell was rung and whistle sounded. Mathews testified the bell rung after alarm whistle sounded. Ten witnesses, whose attention was directed to the train at the time, and immediately before the accident, whose opportunity to see and know was such as to entitle their testimony to great weight, testified the bell was not rung so far as they heard, and the whistle was not sounded continuously, but some say they heard one, and some say two toots only, of the whistle. This testimony is not negative in the sense that it is the

testimony of witnesses who did not know whether or not a bell was rung or a whistle sounded, but as said in C., B. & Q. R. R. Co. v. Lee, 87 Ill. 254, "This is testimony not negative in its character. It is the evidence of witnesses whose attention was directed to what was transpiring, and the jury saw and heard them when testifying, observed the manner and demeanor of all the witnesses for plaintiff and defendant when upon the stand, and knew better than we can from the record, what weight should be given to the testimony of the several witnesses." I. C. R. R. Co. v. Slater, 129 Ill. 91. It is a fair conclusion also, from the evidence, that the neglect to give either of the signals as required by the statute induced plaintiff to proceed and attempt to cross, believing he would thereby incur no danger. There was testimony showing that the train was running at a rate of speed greater than that of passenger trains of defendant, which was thirty miles an hour. That the maximum rate of speed which, by the rules of defendant, the train in question was permitted to be run, was twenty miles per hour. That the plaintiff, when approaching the crossing and just before he drove on the track, used his sense of sight and hearing, looked both ways up and down the track, and neither saw nor heard the train, and Gray, a witness for plaintiff, testified he was going into Marion with a wagon drawn by mules, was behind plaintiff's wagon and had turned his mules' heads to pass plaintiff and cross, when he saw the train about ninety feet distant and then jerked his mules back. That he heard no bell ringing, but they gave one whistle when he first saw the train. It is quite manifest that if either of the signals had been given, and plaintiff thereby warned of the approach of this swiftly moving train, he would not have gone upon the track and exposed himself to the peril of a collision. The question of the care and caution of the plaintiff was one of fact for the jury to determine, and as before said, the evidence justified them in finding he was exercising reasonable care for his personal safety when approaching and attempting to cross the defendant's road. Complaint is made, however, that the court erred in

giving the fifth and seventh instructions for plaintiff. The fifth instruction is as follows:

"The giving of four or five blasts of the locomotive whistle, or ringing of the bell for less distance than eighty rods before the reaching of the public crossing, is not a compliance with the law. The law requires that the whistle on the locomotive must be sounded eighty rods from the crossing and kept continuously sounding until the engine reaches the crossing, or the bell on the engine be rung eighty rods before reaching the crossing, and kept continuously ringing until the engine reaches the crossing; and if you believe from the evidence that the whistle was not so continuously sounded, or that the bell was not so continuously rung, and by reason of such failure to ring the bell or so sound the whistle, the plaintiff, Odum, was lulled into a feeling of security in attempting to cross the railroad of defendant, and that he was exercising such care and caution for his own safety as would have been exercised by a reasonable, prudent man under like circumstances, then in such case you should find the defendant guilty, and assess the plaintiff's damages at such sum as you think him entitled to from the evidence."

In support of the objection to said fifth instruction, counsel for appellant cite *T., St. L. & K. C. R. R. Co. v. Cline*, 135 Ill. 44. The instruction in that case; referred to by counsel, omits the material statement found in this fifth instruction, that plaintiff "was exercising such care and caution for his own safety, as would have been exercised by a reasonable, prudent man under like circumstances." Furthermore, the court say in the opinion, that giving the condemned instruction would not, of itself, afford grounds for reversing the judgment in that case. We find no reversible error either in giving said fifth instruction. The seventh instruction was given as applicable to the first count of the declaration, which charges negligence in running defendant's train at a high and dangerous rate of speed, and is as follows:

"The court further instructs you, that if you believe from

the evidence that the plaintiff was free from negligence on his part in attempting to cross the track of the railroad, and the defendant's servants were guilty of negligence either in running over the crossing in question at a greater rate of speed than was usual and than was reasonably safe to persons about to cross the track, or in not ringing a bell continuously or sounding a whistle for a distance of eighty rods before reaching the crossing, and that by reason of such neglect the plaintiff and his property was injured and the plaintiff thereby damaged, then the jury should find the issues for the plaintiff, and assess his damages at any sum you believe him entitled to from the evidence." This instruction is objected to, because, 1st, by it the jury are told "that the running of a train over a crossing at a greater rate of speed than was usual, is negligence." 2d. "It authorizes the jury in case they find for the appellee to assess damages at any sum the jury may believe the appellee entitled to." The second ground does not fairly state the tenor of the instruction, nor was giving it, prejudicial to the defendant. The jury in assessing damages were restricted to the amount they believed from the evidence, plaintiff was entitled to, and the damages allowed were less than the amount claimed in the declaration, and no point is made that they are excessive; therefore, as to damages, the instruction did not prejudice defendant's rights. The first ground also does not fairly state the text or tenor of said instruction. By it the jury are informed, if they believe from the evidence that plaintiff was free from negligence, and the defendant's servants were guilty of negligence in running over the crossing at a greater rate of speed than was usual, and than was reasonably safe to persons about to cross the track, and that by reason of such neglect, plaintiff was injured and damaged, he was entitled to recover. This states the law correctly as to the duty and liability of appellant in operating its train, and submits the question of negligence to the jury as a question of fact to be determined by them from the evidence.

While it is true, the law does not limit the rate of speed

at which railroad trains may be run in approaching highway crossings outside of incorporated cities and towns to a certain number of miles per hour, yet there is a duty imposed upon railroad companies to operate their trains with due regard to the safety of those traveling along the highway over such crossings, and not to recklessly or carelessly run their trains at such a high rate of speed when approaching a highway, as to endanger the safety of such travelers, and to use reasonable care in running, managing and controlling their trains, with respect to speed, to avoid collisions at such crossings. The failure to perform this duty is negligence, creating liability to a person injured thereby, and free from negligence himself. The degree of diligence required of such corporations in performing the duty, depends upon the circumstances of each case, and must be a degree of diligence amounting to reasonable care. I. & St. L. R. R. Co. v. Stables, 62 Ill. 313; R. R. I. & St. L. R. R. Co. v. Hillmer, 72 Ill. 235; C. B. & Q. R. R. Co. v. Lee, 87 Ill. 454. Finding no error in giving the instruction, the remaining questions to determine are whether the evidence was sufficient to establish the fact that defendant was guilty of the negligence charged in said first count, and if so, did that negligence result in the injury complained of? As before stated the evidence justified the jury in finding that the train in question, when approaching the crossing, was running at a speed of thirty miles an hour, in violation of the rule, known to those in charge and control of the train, limiting the maximum rate of speed to twenty miles an hour; that the crossing in question was much traveled by the public; that this fact was also known to those in charge and control of the train; that at the time of the accident there was much dust upon the highway obscuring the view, and that there were obstructions preventing one approaching the crossing on the highway as appellee did, from seeing far up the railroad track. These and other circumstances in evidence would support the finding that defendant was guilty of negligence in running its train at a high and dangerous rate of speed as charged in the first count. It is also apparent from the

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evidence that if the train had been running at and immediately before the accident, even at the maximum rate allowed by the said rule, the wagon would have been drawn across the track out of danger, and plaintiff would not have been injured. Hence, upon a careful consideration of all evidence, we have reached the conclusion that the liability of defendant under the first count, was fairly established. We perceive no good reason for reversing the judgment and it is affirmed.

Edwin Taylor v. Martha Taylor.

1. NOTICE—*In Chancery Proceedings—Cured by Appearance.*—Where a written notice informs the party to be affected thereby of the time and term of court when and where the party serving it will present her petition, and what steps were proposed to be taken, the appearance of counsel on behalf of the party to be affected at the hearing, without objection, will justify the court in finding the notice had been received by him, and he was regularly in court in response to it.

2. EVIDENCE—*Admission Without Objection.*—Where a sworn petition was introduced and read in evidence on behalf of defendant without objection thereto, or exception by counsel for plaintiff in error, it is too late to make objection in the Appellate Court.

3. CHANCERY PRACTICE—*Hearing Upon Bill and Answer.*—Where a party to a chancery proceeding consents to a hearing upon the bill and answer, without replication, he admits all that is stated in the answer, to be true.

Memorandum.—Chancery proceedings to open a decree entered upon service by publication. Error to the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

STATEMENT OF THE CASE.

On April 9, 1890, Edwin Taylor filed his bill for divorce in the City Court of East St. Louis, alleging he had been a resident of St. Clair county, Illinois, for one year; that he was married to defendant, Martha Taylor, April 23, 1878, in St. Louis, Mo., and cohabited with her until August 1,

1887, and provided her with all the necessaries and comforts of life, to the best of his means; that on August 1, 1887, she deserted him without cause, and remained away for more than two years, and has persisted in such desertion; makes Martha Taylor defendant, and prays that said marriage be declared null and void.

Summons issued April 9th, and was returned April 11, 1890, by the sheriff, "not found." On July 7, 1890, Taylor filed his affidavit, setting forth that defendant was a resident of St. Louis, Missouri. Notice to defendant of the pendency of the suit was published in the "East St. Louis Signal," seven successive weeks; the first publication on July 12, 1890, and the last on August 23, 1890. On July 16, 1890, the clerk of said court mailed copy of the published notice, addressed to Martha Taylor, St. Louis, Mo. On October 18, 1890, the City Court entered a decree of divorce as prayed for. On November 10, 1892, notice in writing, signed by said Martha Taylor, addressed to said Edwin Taylor, was served on, and receipt thereof acknowledged in writing by N. Flannigan, who had acted as Taylor's solicitor in the divorce proceeding, stating that on the first day of the next term of said court, or as soon thereafter as counsel could be heard, Martha Taylor, defendant in said cause, will present a petition to said court asking leave to file her answer to the bill of complaint therein, and that she be heard touching the matter of the decree rendered, as allowed by the statute in such case made and provided, at which time and place Taylor could appear and oppose the petition, if he saw fit to do so. On the original notice is this written indorsement: "Served the within notice in the City of St. Louis, Mo., this 10th day of November, 1892, by delivering a true copy thereof to the within named, Edwin Taylor. Ben. F. Brady, Constable 6th District, City of St. Louis, State of Mo., by John Ellison, Deputy."

The petition of defendant in error was presented to the City Court of East St. Louis, in pursuance of the above notice, and sets up the foregoing proceedings in the divorce case. That she was not served with the summons issued in said

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cause, nor with a copy of the bill of complaint therein. That she did not receive the notice of publication of the pendency of the suit, required to be sent by mail by the clerk, and has not been served with a notice in writing of such decree. Prays to be heard, touching the matter of such decree. Presents her answer with said petition denying that complainant is or was an actual resident of said county of St. Clair, or of the State of Illinois, at the time, or as alleged in the bill. Admits the marriage, and that she lived with complainant, as alleged. Denies desertion charged. Alleges his desertion of her, without cause, on August 1, 1887, and ever since. Petitioner asks leave to file her said answer, and that upon a hearing of the matter involved in said suit, the decree may be set aside or amended as shall be just and right, and for general relief. The petition is sworn to by Martha Taylor, before E. Millard, notary public, November 9, 1892.

On December 5, 1892, said court granted leave to redocket the divorce case, and to file said petition and notice, and the same was taken under advisement by the court. On December 12, 1892, leave was granted defendant to file her answer, and she is allowed to contest the decree theretofore entered in said cause, with such decree to stand until final hearing, and the cause was set for final hearing on the 19th day of December, 1892.

On December 20, 1892, the parties came by their respective solicitors, C. W. Thomas, for complainant, and M. Millard, for defendant. Counsel agreed the cause should then be heard, and that a jury be waived. Thereupon the court heard the cause on the bill, answer and evidence adduced, and having heard counsel, found that the complainant had not resided in this State one year before bringing this suit; that he is now and was, before filing his bill herein, a resident of the city of St. Louis, State of Missouri; that he is known by the name of Thomas E. Taylor; that defendant did not desert him as charged, but that he deserted her, for more than three years last past, without any cause or provocation, and that complainant was not entitled to a divorce;

that defendant is now and has been for more than seven years last past, an actual resident of the said city of St. Louis, and has resided during that period in the home provided for her by complainant; that defendant was not served with process or copy of the bill, and did not receive a copy of the notice of the finding of this court, published by the clerk and sent by mail, as required by law, and has not been served with a notice in writing that the decree herein was rendered, and had no actual notice of any kind, that this suit had been instituted and the decree rendered until October, 1892; that there was neither jurisdiction of the parties or subject-matter of this cause, and the decree is wholly void and ought to be set aside. It is further ordered that the decree for divorce be vacated, set aside and annulled; that the bill of complaint be dismissed with costs, and execution issue therefor. It appears by the certificate of evidence, that at said final hearing defendant read her petition in evidence without objection, and the notice and receipt of Flannigan and indorsement of service as before stated, and it is further stated in the certificate that no other evidence was offered or heard upon the said hearing.

CHARLES W. THOMAS, attorney for plaintiff in error.

M. MILLARD, attorney for defendant in error.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

It is contended on behalf of plaintiff in error, that the decree vacating and annulling the decree for divorce and dismissing the bill, should be reversed by this court for two reasons. 1st. Because there was no proof before the court at the time the answer was permitted to be filed, that plaintiff in error had received notice of the proposed proceeding. 2d. Because there was no sufficient proof at that time that defendant in error did not have full notice of the divorce proceedings. In support of the first point, it is said the receipt of the written notice by Flannigan, as attorney for plaintiff, was insufficient, because at time of service the rela-

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tion of attorney and client, between them, had ceased, and that the service of said notice on plaintiff in error, by the constable in St. Louis, was a nullity, because the return was not sworn to. The written notice fully informed plaintiff in error of the time and term of court, when and where the defendant in error would present her petition, and what steps were proposed to be taken, and the appearance of counsel on his behalf at the hearing, without objection, justified the court in finding the notice had been received by him, and he was regularly in court in response to the notice. Hence, the first point is not well taken. The contention under the second point is, that the court erred in receiving and considering as evidence the said petition sworn to by defendant in error. It appears, however, that at the hearing, both parties appeared by counsel. That a jury was waived and the cause was heard by consent on the bill, answer and evidence, and argument of counsel. That the said sworn petition was introduced and read in evidence on behalf of defendant, without objection thereto, or exception by counsel for plaintiff in error, and it is too late now to make objection. It should have been made below, and if the evidence was held incompetent, the defendant would have been afforded an opportunity to supply competent evidence to prove the same facts. In the case of *Washington v. L. & N. Ry. Co. et al.*, 136 Ill. 55, a motion was made by defendants in the trial court that judgment for \$200 and costs be entered for plaintiff, in accordance with her agreement, as administratrix of the estate of Washington, to accept that sum in satisfaction and release of the claim against the corporation. Plaintiff resisted the motion on the ground that the execution of said agreement had been procured by fraud and misrepresentation, and filed her affidavit setting forth facts to support her contention; defendants filed counter affidavits. The motion was sustained, and judgment for plaintiff was entered for \$200 and costs.

In the opinion, it is said complain^t is made that by the course pursued, plaintiff was deprived of the right to cross-examine affiants for defendants, but as she was in court

resisting the motion and made no objection to the consideration of the affidavits by the court, she can not now be heard to complain. If improper evidence was offered in support of the motion she should then have objected to it, and thereby, if it was held to be incompetent, enable defendants to supply other and competent evidence. The rule thus announced is applicable to the facts in this case and decisive against the second reason assigned for reversal. In conclusion, it is only necessary to say, appellant was represented by counsel, and having consented to a hearing upon the bill and answer, without replication, he admitted all that was stated in the answer to be true. *Pankey v. Raum*, 51 Ill. 88; *County of Cook v. G. W. R. R. Co.*, 119 Ill., p. 224; and the facts stated in the answer and in the petition, justified the court in its findings, and the court properly held it did not acquire jurisdiction and did not err in vacating the decree for divorce which had been entered, and dismissing the bill. The decree appealed from is affirmed.

James M. Lane, James C. Ralls, I. M. Samuels, Frank Belford, L. M. Carter, Louis Belford and John R. Phillips v. Polly Ann Tippy.

1. **INTOXICATING LIQUORS—*Liability of Partners.***—Where two or more persons are partners in the business of selling intoxicating liquors, each of them is responsible for all the sales made in the prosecution of their joint business.

2. **INTOXICATING LIQUORS—*Notice Not to Sell.***—No notice is necessary to prevent sales of intoxicating liquors to an habitual drunkard. The law prohibits such sales and gives all the notice necessary.

3. **INTOXICATING LIQUORS—*Sales to Habitual Drunkard.***—The fact that a person may have been an habitual drunkard for years before the time sued for, is not a bar to the action to recover damages for sales to him. In such cases, the victim has the right to reform.

4. **INTOXICATING LIQUORS—*Theory of the Prohibitory Law.***—The law prohibits the sales of intoxicating liquor to habitual drunkards, upon the theory that if they can not obtain liquor they can not become intoxicated, and that, in the course of time, they may recover the normal

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condition of body and mind to such an extent as to be able to resist the temptation.

5. INTOXICATING LIQUORS—*Extent of Joint Liability.*—It is not necessary, in order to render persons jointly liable, to show that their sales must have begun at the same time and must have kept pace together to the end of the period sued for.

6. INTOXICATING LIQUORS—*Character of the Joint Liability.*—If the sales of intoxicating liquors began a few weeks, or even a few months before sales by others, yet, if the sales were continued contemporaneously for a period of time, all are responsible for the damages resulting, within reasonable limits.

7. INTOXICATING LIQUORS—*What Must Appear to Fix the Liability.*—Before a person can be held liable, it must appear that the liquor furnished by him was the efficient and proximate cause, either wholly or in part, of the intoxication complained of.

8. INTOXICATING LIQUORS—*The Risk Involved in Selling.*—The risk involved in selling intoxicating liquors, is known to persons engaged in such traffic, and is therefore voluntarily assumed when they engage in the business.

9. INTOXICATING LIQUORS—*Joint Liability in Suits for Civil Damages.*—In suits for damages arising from the sales of intoxicating liquors, it is not important that the several defendants have contributed in the same proportion to the injuries complained of. They stand upon the like footing as persons who are engaged in a joint tort, each being subject to liability for the whole damage.

Memorandum.—Action for damages caused by the sale of intoxicating liquors. Appeal from the Circuit Court of Williamson County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

DUNCAN & RHEA, attorneys for appellants.

YOUNG & BAKER and CLEMENS & WARDER, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The declaration in this case charged appellants with the sale of intoxicating liquors to appellee's husband, thereby causing him to become an habitual drunkard, and to squander his money and property as well as the property of his wife, to the injury of appellee in her property and means of support.

Appellants filed two pleas, the first, not guilty, and the second, the five years statute of limitations. A verdict was returned in favor of appellee for \$400, and judgment was rendered against appellants for that amount, whereupon they prayed and perfected an appeal to this court.

It is not necessary to search the record to ascertain whether or not appellee's husband was an habitual drunkard, for appellants, on the 19th page of their argument, concede this fact in the following language: "That Tippy was an habitual drunkard, and had been for ten years or more, clearly appears from this record."

With this admission as a starting point, we proceed to the question whether or not all of the appellants assisted in keeping appellee's husband in a state of habitual intoxication, so as to make them jointly liable for the consequences. On the same page of their argument from which the foregoing quotation has been made, appellants make the further statement: "It also appears that some of the appellants have sold him (Tippy) intoxicants a number of times within the last year or two, prior to the bringing of this suit. But these facts, of themselves, do not make out a case of joint liability against all the appellants."

Proceeding upon the theory that if a judgment against many is erroneous as to one, it must be reversed as to all, appellants virtually admit that five of the seven appellants sold liquor to the appellee's husband with sufficient frequency to make them liable if the other elements of liability were proved, but they affirm that the other two appellants, L. N. Carter or Mark Carter and Frank Belford are not liable under the evidence, and that therefore the judgment, which is joint, must be reversed. On the 8th page of their argument, appellants say: "The only evidence of Mark Carter selling Tippy whisky is found in the testimony of Thomas Ice at pages 16 to 18 of the record." Appellants have read the record carelessly. N. W. Crain testified that he had seen Tippy drink tolerably frequently in a number of saloons, among them, the saloon of Carter & Belford. (Rec. p. 46.) William Sanders testified that he had seen

Tippy drink whisky and beer frequently in Mark Carter's saloon. (Rec. p. 81.) Now, Mark Carter and Frank Belford were partners, during all the time Carter was in the business at all, and this partnership began about seven months prior to the commencement of this suit and was continued to the time of the trial. Each of them was responsible for all the sales made in the prosecution of their joint business. Therefore the testimony of Thomas Ice, N. W. Crain and William Sanders, applies to each of these two appellants. Then there is the testimony of Moody Cagle, that he had seen appellee's husband and George Sanders drink together several times in Frank Belford's saloon about one year before the trial; that Tippy was then "pretty drunk," and that Frank Belford "waited on them." (Rec. p. 117.) And yet appellants, on the 8th page of their argument, say: "The only evidence of Frank Belford furnishing him (Tippy) intoxicants, is in the testimony of N. W. Crain, at page 45 of the record."

In view of the foregoing admissions and evidence, it is apparent that every one of the seven appellants contributed materially to the habitual intoxication of appellee's husband, during the year or two preceding the commencement of this suit, to which period of time the mass of the testimony on this point is confined.

What do appellants themselves testify on the subject? Rolls and Samuels, whose liability is virtually admitted, swear that they did not sell to Tippy after his wife notified them to desist. The other five appellants, though sworn as witnesses, do not deny making the sales, but state that they had no notice from the wife not to sell to the husband. What notice was necessary? The law prohibits sales to an habitual drunkard. This man Tippy had been an habitual drunkard for years, and these appellants must have known the fact. The law and the fact gave all the notice which was required. We conclude that the evidence was sufficient to justify the jury in finding that every one of the appellants had sold intoxicants repeatedly to appellee's husband, and had contributed in a material degree to his habitual

intoxication. It is not the case of a single lapse on the part of some law-abiding vender of spirits, but of a frequent violation of the law by those who must have known Tippy's inclination to excessive indulgence.

The fact that Tippy may have been an habitual drunkard for years before the time sued for, is not a bar to this action. In such case the victim has the right to reform. The law prohibits sales to him upon the theory that if he can not obtain liquor, he can not become intoxicated, and that in the course of time he may recover his normal condition of body and mind to such an extent as to be able to resist the temptation.

Appellants are not charged with creating the appetite, but with fostering it. If they kept appellee's husband in a state of habitual intoxication for one or two years, they are responsible for the injury to the wife's means of support, thereby caused, even though the husband may have been an habitual drunkard before they began to sell to him.

It is contended, in effect, though not in exact terms, that in order to render appellants jointly liable, their sales must have begun at the same time and must have kept pace together to the end of the period sued for. Such a construction of the law would make it hopelessly inoperative, and must be made by a higher court than this, before it can be accepted here without question. If the sales of one appellant began a few weeks or even a few months before the sales of the others, yet if the sales were continued contemporaneously for a period of time, appellants are all responsible for the damages resulting within reasonable limits, and it is not necessary, with surgical precision, to sever the damages so that they may begin and end with the commencement and the cessation of contemporaneous sales. The well considered case of *O'Halloran et al. v. Kingston*, 16 Bradw. 659, is worthy of attention on this point. This was a suit for injury to the wife's means of support, arising from the habitual intoxication of her husband. Mr. Justice Wall, in whose views we concur, in delivering the opinion of the court, says:

It is urged that as to some of the appellants, the proof is

ot sufficient; that it does not show that their sales contributed in any substantial or material degree to the habitual intoxication of the plaintiff's husband. As already stated, we think this position not well taken. It is shown that he visited all the places in question and obtained more or less liquor at each. How much he obtained at each, and to what extent the act of each defendant contributed to the habitual intoxication, it is impossible to state with certainty. The court instructed the jury, that before the defendants could be held liable, it must appear that the liquor furnished by them was the efficient and proximate cause, either wholly or in part, of the intoxication complained of. This instruction was repeated in several different forms, and the jury must have understood the proposition therein contained. We are unable to disagree with their finding in this respect. It was no doubt to meet just such cases the statute was devised, when it laid its penalty upon the person or persons who may have caused the intoxication in whole or in part. And while those who contribute in a small degree, may be thus made to suffer as much as those who are more culpable, yet it is a condition which is applied to the traffic in liquors, which the legislature had the power to impose, and which the courts can not ignore. It must be remembered also, that the risk thus involved was known to, and therefore voluntarily assumed by appellants when they engaged in the business, so that, in a legal sense, it can not be said that they are surprised by the enforcement of the law.

The last two sentences are quoted with approval in *O'Leary et al. v. Frisbey*, 17 Bradw. 553. In this case the court approve of certain instructions in the following language: "These instructions required the jury, before they could find for appellee, to believe from the evidence that her husband was habitually intoxicated, and that the appellant caused such intoxication, in whole or in part, by liquors sold or given to her husband, and that by means of such intoxication she was injured in her means of support. How much he obtained from each, and to what extent the act of each appellant contributed to the habitual intoxica-

tion, it is impossible to state with certainty, but under these instructions they were required to find that the liquor furnished by each of them was the efficient and approximate cause, either in whole or in part, of the intoxication complained of."

In *Buckworth v. Crawford*, 24 Ill. App. 603, the court say: "In suits to recover under Sec. 9 of the Dram Shop statute, the plaintiff may proceed against any and all persons, jointly or severally, who may have caused the intoxication in whole or in part, and in such cases it is not important that the several defendants have contributed in the same proportion to the injuries complained of, and they stand upon the like footing as persons who are engaged in a joint tort, each being subject to liability for the whole damage."

To the same effect is the holding of the Supreme Court, that where the declaration alleges that the husband's habitual intoxication was caused "in whole" by the defendant, a recovery may be had where the proof shows it was caused "in part," only, by the defendant. *Roth v. Eppy*, 80 Ill. 283; *Brannon et al. v. Silvernail*, 81 Ill. 434.

Appellants refer to *Tetzner et al. v. Naughton*, 12 Bradw. 148, as sustaining their views of this case. A careful examination of the *Tetzner* case will show that the actual point decided was, that where one loses his life by reason of a particular intoxication, and suit is brought to recover damages arising therefrom, those who caused the particular intoxication are not liable jointly with those who may have caused his previous habitual intoxication. The soundness of this rule need not be discussed, for it has no application to the case under consideration, where the question is injury to means of support arising from habitual intoxication, and not a special loss resulting from a single act of intoxication.

Nor does the case of *Westphal v. Austin*, 41 Ill. App. 648, antagonize the views which we have expressed in this opinion. We would be loath to believe that the learned judge who wrote the opinion in that case, intended to state what counsel seem to read between the lines. It is there held, that to make a liquor dealer liable under the statute, he must

create, or assist in creating, the very intoxication, habitual or otherwise, from which the injury follows. If one sells liquor to another, whereby the latter becomes an habitual drunkard, and then the seller ceases his sales, and a long time afterward others sell to the same person, and he contracts a disease from the latter sales which causes death, then the former offender is not liable for the injuries resulting from the drunkard's death. But what if the first seller had continued to sell to the moment of the victim's death; would not he and those who began to sell later, all helping materially to produce the disease and to hasten death, become jointly liable for resulting damages? We say, yes. Otherwise a plain statute is repealed by judicial construction.

Appellants contend, in the next place, that there is no proper evidence in the record to show that appellee was injured in her property or means of support. Without rehearsing the evidence, we deem it sufficient to state that we have carefully examined the record, and have found an abundance of evidence to show that appellee was injured in both her property and means of support during the year or two preceding the commencement of this suit.

Upon this point appellants make a special objection to the testimony of four witnesses—Moody Cagle, appellee, Wash Sisney and Pleas Cagle—who testified concerning the drowning of certain sheep in April, 1890, at a time when none of the appellants except Lane, was in the saloon business. When Moody Cagle testified as to the loss of the sheep, but one question was objected to, and that was not answered. (Rec. pp. 119 and 120.) The same is true of the testimony of appellee on this point. (Rec. pp. 185 and 186.) Wash Sisney and Pleas Cagle each testified as to the loss of the sheep, and gave some of the particulars of the accident. Then a wholesale objection was made, and a wholesale exception was taken. The statement of the record as to Sisney's testimony may be sufficient to show that a proper objection was made and exception taken to every question at the time when the same was propounded and held admissible. This is not true of Pleas Cagle's testimony. But if

Sisney's testimony were stricken from the record, the history of the loss of the sheep would be abundantly proved by evidence to which no proper objection was made. Aside from all this, no harm was done to appellants, inasmuch as the damages allowed by the jury are very moderate, and the allowance of a larger sum would have been justified by the evidence. Complaint is made of the rulings of the court in giving and refusing instructions. There are some inaccuracies in the instructions, it is true, but nothing of a substantial nature. The instructions given sufficiently stated the law to enable the jury to properly understand and decide the case.

We are satisfied with the verdict and the judgment is affirmed.

W. B. McCartney v. J. H. Washburn.

1. **SETTLEMENT—*What is Final.***—When a party settles an account about which there is a dispute, and gives his note for the amount settled upon, it is a final settlement.

2. **PROMISSORY NOTE—*Failure of Consideration—Burden of Proof.***—A party who pleads a failure of consideration of a promissory note, has the burden of proving such failure.

Memorandum.—Chancery. Foreclosure proceedings. Error to the Circuit Court of Massac County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

C. L. V. MULKEY, attorney for plaintiff in error.

TAYLOR DODD and W. A. WALL, attorneys for defendant in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT,
The plaintiff in error on the 13th day of December, 1890.

McCartney v. Washburn.

executed and delivered to defendant in error a note for \$1,700, and secured the same by a mortgage. On a bill filed to foreclose the mortgage, a defense of fraud and failure of consideration as to \$160 of the amount was set up in the answer, which on hearing was disallowed by the court, on the ground that whatever may have been the fact as to the \$160, it was an item specifically in dispute at the time of the execution of the note and mortgage, and a settlement had between the parties. The evidence shows this item was in dispute at the time the note was given, and was the subject of bitter contention; that plaintiff in error advised with friends, and finally agreed to the payment of the \$160, whereupon that item was embodied in the \$1,700 note.

The plaintiff in error, however, contends that this item was included in the agreement of the defendant; that thereafter they would go to see the parties to whom the \$160 had been paid for wheat, which had been delivered at the mill of plaintiff, and if they did not sustain his claim, then the money would be refunded.

The court below, in its written opinion, which is embodied in the record, did not notice this feature, or at least did not allude to it in the opinion; this claim of agreement is not denied by defendant.

We have, therefore, looked into the record to find evidence to sustain the plaintiff's contention that the defendant did not, in fact, pay out for plaintiff the \$160; for as between the parties, if a settlement is made conditional, as here claimed, we understand the facts may be afterward proven. Washburn swears that he did not pay the \$160; exhibits his memorandum of payment, and gives the names of some of the parties to whom such payments were made.

This proof is in addition to the *prima facie* proof offered by the note itself.

The burden then was on McCartney to disprove such payments.

None of the parties to whom it was claimed by Washburn, money had been paid, were called upon to disprove such payments.

McCartney thinks, from the amount of wheat in the mill, that Washburn did not buy the wheat claimed.

From this alone, and what other parties told him, which was not competent, he formed this conclusion.

On the question of fact, the evidence in this record does not sustain the defense of failure of consideration as to the \$160, and the decree is affirmed.

Tycent Heindselman v. The People of the State of Illinois.

52	542
108	432

1. **BASTARDY—*Erroneous Instructions.***—In a bastardy proceeding, it is error to instruct the jury that "the mother of the child is most likely to know who its father is, and by whom it was begotten, and it is for the jury to determine from all the evidence in the case, and all the circumstances, whether they believe the prosecuting witness has told the truth in this case or not."

Memorandum.—Bastardy proceedings. Appeal from the County Court of Richland County; the Hon. T. A. FRITCHEY, Judge, presiding. Heard in this court at the August term, A. D. 1893. Reversed and remanded. Opinion filed March 23, 1894.

The opinion states the case.

R. B. WITCHER and McCATLEY & ROWLAND, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellant was found to be the father of the bastard child of Estella Elston, and appealed the case to this court. Numerous errors are assigned. The third, sixth, seventh, eighth and ninth instructions given for the appellee, were erroneous. The eighth was: "The court instructs the jury that the mother of the child is most likely to know who its father is, and by whom it was begotten, and it is for the jury to determine from all the evidence in the case, and all

Simms v. Guess.

the circumstances, whether they believe the prosecuting witness has told the truth in this case or not."

Comment is unnecessary on this instruction. The ninth instruction is as fatally defective.

The appellee filed no briefs in this case, and therefore, under rule 27 of this court, we are authorized to reverse.

The judgment is reversed and the cause remanded.

William Simms, Administrator of the Estate of Sarah A. Bunn, Deceased, v. W. F. Guess, Guardian, et al.

1. ADMINISTRATOR OF ESTATES—*Duty of Making Inventories.*—An administrator or executor is not the sole judge of the performance of his duty in making an inventory under Sec. 51, Ch. 3, R. S. Necessarily, the ultimate determination must rest in court, otherwise if the representative refused to inventory any property, the court would be powerless to administer on the estate.

2. PERSONAL REPRESENTATIVES—*Suits on Bonds Not an Exclusive Remedy.*—While the law affords a remedy upon the bond of an administrator, it is not exclusive. Such remedy exists as to any failure to perform an official duty, as for a failure to collect what is due the estate and pay the same out on the order of the court. The court is not powerless to require the representative to perform his duties, because damages for a failure could be recovered on his bond.

3. PERSONAL REPRESENTATIVES—*Claiming Property as his Own.*—An administrator, if he claims as his own property ordered to be inventoried, can note the fact in explanation of his action on the inventory, and this will not bar him of a hearing on the question of ownership in a regular trial at law. An order to inventory property is only interlocutory and not an adjudication of the right of property.

4. ADMINISTRATION OF ESTATES—*Power of the Court to Order Property Inventoried.*—Ordering the administrator to inventory property of the deceased, is a summary proceeding on the part of the court in the nature of a preliminary investigation to determine probabilities and not ultimate rights.

5. ADMINISTRATION OF ESTATES—*Effect of the Order to Inventory Property Claimed by the Administrator.*—The effect and purpose of such preliminary order is to bring the matter of the disputed property within the jurisdiction of the court, so that an adjudication in the interest of the estate may be had on such property.

6. ADMINISTRATION OF ESTATES—*Claims by Administrators.*—Where

an administrator has a demand against his testator, or intestate's estate, the court in such case will appoint some discreet person to appear and defend the estate, at which hearing a trial is to be had according to the course of the common law, with right of appeal, etc.

7. ADMINISTRATION OF ESTATES.—Sec. 8, Ch. 3, R. S., has no application to a case where the administrator is not ignorant of facts necessary to enable him to list property in dispute, or to identify or locate it. Not being concealed, a discovery is not required.

Memorandum.—Administrator of estates. Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

STATEMENT OF THE CASE.

Sarah A. Bunn, the appellant's intestate, died on the 24th day of September, 1891. On the following 2d day of November, appellant—being the decedent's son—was appointed administrator of her estate, and as such filed an inventory of property, to which exceptions were taken by the guardian of two minor children interested in the estate, and also by Cora Dickinson, on the ground that property of the estate, some of which was alleged to be in his possession and other within his knowledge, was not inventoried. On trial in the County Court, there was a finding against the appellant in part, from which order an appeal was taken to the Circuit Court, where the finding was also against him, and this appeal was presented.

The court adjudged that William Simms, as administrator of the estate of Sarah A. Bunn, inventory the following property: One bed and bedding, heating stove, one bureau, one yearling heifer, three dozen chickens, fifteen turkeys, \$109.53 cash obtained from the Sumner Bank (T. L. Jones & Son), ten promissory notes secured by real estate mortgage, executed by Tobias Heath to decedent, Sarah A. Bunn, dated May 30, 1891, and an account against himself for \$200, and that defendant pay the cost of suit, and that an execution issue therefor. The effect of appellant's claim is that all the property of the estate had been given to him during the lifetime of his decedent, in consideration that he would

support her; that the notes were indorsed and delivered to appellant before her death. The delivery, as well as the gift of any property to appellant is denied by appellees.

GEE & BARNES, attorneys for appellant.

FOSTER, MCGAUGHEY & ROBINSON, attorneys for appellees.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The points primarily made by appellant are, 1st, that the remedy to compel him to inventory the property included in the order of the court was by citation, under Sec. 81, Chap. 3, S. & C., p. 226, and not by exceptions to his inventory; 2d, that he could not be compelled to inventory a debt against himself, which was in dispute, except on a trial under written pleadings and a judgment obtained against him.

Section 51, Chap. 3, S. & C., p. 212, provides that an "administrator shall make out a full and perfect inventory of all such real and personal estate, or the proceeds thereof, as are committed to his superintendence and management, and as shall come to his hands, possession or knowledge."

This duty, enjoined by express law, the County Court has the power to enforce. The administrator or executor is not the sole judge of the performance of that duty. Necessarily the ultimate determination must rest in the court, otherwise, if the representative refused to inventory any property, the court would be powerless to administer on the estate. It is no answer to say there would be a remedy on the representative's bond. While the law affords such remedy, it is not exclusive. Such remedy exists as to any failure to perform official duty, as for a failure to collect what is due the estate and pay same out on the order of the court, yet it would not be contended that the court was powerless to require the representative to perform such duty because damages for such failure could be incurred in his bond.

The representative, if he claims property ordered to be inventoried, can note the fact in explanation of his action

on the inventory (*Lynch v. Dinan*, 66 Wis. 490, *Hilton v. Briggs*, 54 Mich. 265), which would not bar him of a hearing on the merits in a regular trial at law; such an order would be only interlocutory and not an adjudication of the right of property. The mode of proceeding clearly so indicates. It is summary on the part of the court in the nature of a preliminary investigation to determine probabilities, and not ultimate rights. No one would claim final adjudication for such an order as to third parties. It has no more effect on the representative in case he claims the property. While he is a party to the proceeding, it is only in a representative, and not in an individual capacity. The effect and purpose of such preliminary order is to bring the matter of the disputed property within the jurisdiction of the court, so that an adjudication in the interest of the estate on such property may be had.

Such order in its scope and effect is like one requiring a receiver to list property in dispute. *Seavey v. Seavey*, 30 Ill. App. 625. Having listed such property, the course of the representative, in order to have an adjudication on the right of property according to the course of the common law, is clearly outlined in *May v. Leighty et al.*, 36 Ill. App. 17. Sec. 72, Chap. 3, provides the course to be pursued when one executor or administrator has a demand against his testator or intestate's estate. The court in such case will appoint some discreet person to appear and defend the estate, at which hearing a trial is had according to the course of the common law, with right of appeal, etc.

Appellant's counsel insists the remedy was by citation under Sec. 81, Chap. 3. The evident purpose of that section is to compel the discovery of property of the estate, or of information in regard thereto "of which the executor and administrator is ignorant" in order that it may be listed in the inventory and ultimately brought within the control of the court.

In the case at bar the administrator was not ignorant of any facts necessary to enable him to list the property in dispute, or to identify or locate it. It was not concealed and therefore discovery was not required.

Young v. Copple.

The appellant having wrongfully made the costs, there was no error in adjudging that he should pay them. Covington case, 124 Ill. 363.

It is urged the evidence does not warrant the order made. This point is made on the theory that the order has the effect of a determination of the right of property, without expressing any opinion as to the sufficiency of the proof in that regard. We hold it was sufficient to require the property to be listed.

It is also objected that the Circuit Court did not require its order to be certified to the County Court for further proceedings in accordance therewith. Such an order would have been proper, but it was not essential. The order can be certified to the court below, whereupon that court will, of course, conform to it.

The order and judgment of the Circuit Court is affirmed.

A. H. Young v. Charles Copple.

1. JUDGMENT IN CRIMINAL CASES—*Not Conclusive in Civil Proceedings.*—A judgment in a criminal case, though admissible to establish the fact of the rendition of the judgment, can not be given in evidence in a civil action to establish the facts on which it was rendered. But in such case a judgment rendered on a plea of guilty may be admitted in evidence as a solemn admission to be weighed by the jury in connection with all the other evidence in the case.

2. INSTRUCTIONS—*When Not Misleading.*—An instruction which tells the jury to find the defendant not guilty, unless the plaintiff had proved every material allegation of the declaration by a preponderance of the evidence, is generally understood as meaning no more than that the burden of proof is on the plaintiff in the first instance; and when taken in connection with other instructions which show what the plaintiff must prove in order to recover, can not be regarded as misleading in any proper sense of the word.

Memorandum.—Action of trespass to the person. Appeal from the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

W. STOKER and H. C. GOODNOW, attorneys for appellant.

W. F. BUNDY, L. M. KAGY and C. E. JENNINGS, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The first question presented for our consideration is, whether or not a plea of guilty to an indictment for an assault with a deadly weapon, with intent to inflict a bodily injury on the person of another, where no considerable provocation appears, estops the defendant, when sued in an action of trespass for damages for the same assault, from justifying the assault as having been made in the proper defense of his person or property. The trial court, answering this question in the negative, permitted the appellee, who was the defendant in the court below, to give his reasons for pleading guilty to the indictment. The appellant challenges the correctness of this ruling.

The law is that a judgment in a criminal case, though admissible to establish the fact of the rendition of the judgment, can not be given in evidence in a civil action to establish the facts on which it was rendered. 1 Greenleaf on Evidence, 12th Ed., Sec. 537; Freeman on Judgments, 3d Ed., Sec. 319; Corbley v. Wilson, 71 Ill. 209. Many reasons are assigned in support of this rule of law; as, that there is no mutuality; that the rules of decision and the course of proceeding are not the same; that the defendant could not avail himself in the criminal proceeding of any admissions of the plaintiff in the civil action. It seems also to be the law that the record of a judgment in a criminal case, upon a plea of guilty, is admissible in a civil action against the defendant as a solemn judicial confession of the fact. See note 5 to the section of Greenleaf on Evidence above cited, where it also stated that according to some authorities such a record is conclusive, but that the conclusiveness thereof has since been doubted, for the reason that the plea may have been made to avoid expense.

In our opinion, sound reason favors the latter view. In the case before us, the evidence shows, without contradiction on the part of appellant, that the latter had threatened to break up appellee with expensive litigation and to run him out of the country. Appellee testified that he had entered the plea of guilty in the criminal case, under the influence of these threats, because he "didn't want to go to court" and thought "pleading guilty would be the cheapest way to get out of it." The costs of a criminal proceeding, such as assault and battery, not unfrequently amount to more than the maximum fine which can be imposed. If the defendant in such a case, even though not guilty in fact, should prefer to plead guilty and pay a fine rather than undergo the ordeal of a trial by jury, with all its embarrassment, expensiveness and uncertainty, he should be permitted to do so, without any fear of having the record produced as a conclusive estoppel upon him if a civil action should be brought to recover damages for an injury growing out of the same occurrence. The record should be admitted in evidence as a solemn admission to be weighed by the jury in connection with all the other evidence in the case; but until the Supreme Court of this State shall hold the contrary, it will be our opinion that such a record is not conclusive.

Aside from the merits of the question, appellant is in no position to ask a reversal of the judgment on the point under consideration, for the reason that no exception has been preserved to the ruling of the trial court in admitting the evidence complained of, and the instructions on both sides recognize self-defense as a proper issue under the evidence.

Another alleged error relied upon by appellant, is the refusal of the court to permit appellee to answer, on cross-examination, whether or not he went before a justice of the peace on the day of the difficulty and complained against himself as being the aggressor, asking the justice to fine him for an assault and battery. The record fails to show that any exception was taken to this ruling, and therefore the question is not properly before us for consideration.

It is alleged that the court erred in giving appellee's first

instruction, which told the jury to find the defendant not guilty, unless the plaintiff had proved every material allegation of the declaration by a preponderance of the evidence. It is said that this instruction would require the plaintiff to prove permanent disability of his right arm, whereas he would be entitled to recover on proof of temporary disability merely. But permanent disability, even if averred, need not be proved, being an immaterial allegation. Furthermore, an inspection of the declaration, which contains but one count, shows that it does not allege permanent disability. This instruction is generally understood as meaning no more than that the burden of proof is on the plaintiff in the first instance; and when taken in connection with other instructions, which show what the plaintiff must prove in order to recover, can not be regarded as misleading in any proper sense of the word. In fact the propriety of giving such an instruction is no longer an open question in this State. The Supreme Court have sanctioned the practice. *O. & M. Ry. Co. v. Porter*, 92 Ill. 437; *Ladd v. Pigott*, 114 Ill. 647.

Complaint is also made of the action of the court in giving the second, third, fourth and fifth instructions asked by appellee. As we understand appellant's argument, he does not question the soundness of these propositions of law in a proper case, but insists that they are not based upon the evidence in this record, and were, for that reason, calculated to mislead the jury. Without entering into a consideration of the evidence, it is sufficient to say that the evidence, though conflicting, justified the giving of these instructions, and authorized a verdict for appellee.

The only other complaint made by appellant, concerns the refusal of an instruction designated as appellant's second refused instruction. This instruction was properly refused, because it assumed that the fence over which the difficulty arose, was appellant's fence, and also that appellee assaulted appellant for taking it down, when these were the very questions in dispute, and vital to the decision of the controversy between the parties.

The judgment of the Circuit Court is affirmed.

City of Sumner v. Ellen Scaggs.

1. **NEGLIGENCE**—*Right of a Person to Presume Places, etc., to be Safe.*—A person knowing a sidewalk to be dangerous, has no right to presume it to be safe, and act upon that presumption.

2. **INSTRUCTIONS**—*Assuming Facts.*—An instruction which assumes the existence of a fact in dispute, invades the province of the jury.

3. **SIDEWALKS**—*When Not Dangerous Per Se.*—Constructing a sidewalk elevated above the surface thirty inches, and without guard rails, is not negligence *per se*, nor conclusive evidence that such sidewalk where it is so constructed is a place of danger.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, GEE & BARNES, ATTORNEYS.

Cities are only required to provide ways that shall be reasonably safe; a railing or barrier is not to be erected because one may meet with an accident if there is none. Logan v. City of Bedford, 32 N. E. Rep. 310; Damon v. City of Boston, 149 Mass. 151.

**APPELLEE'S BRIEF, W. F. FOSTER AND WM. ROBINSON,
ATTORNEYS.**

For the proper and safe construction of a sidewalk, the city authorities are responsible. It is their duty to see that the sidewalks are reasonably safe and are kept so. Alexander v. Town of Mt. Sterling, 71 Ill. 366.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit to recover damages for personal injuries charged to have been caused by the negligence of appellant in maintaining its sidewalk elevated above the ground, without guard rail on either side, and without light to indicate place of danger, or enable the traveling public to

see their way on said walk. Appellee was the only one who testified how she received the injury. Her version is, that on her way to spend the night with her daughter, she turned a corner at which a street lamp was lighted, and had walked east about ninety feet along the street toward her daughter's residence, when everything turned black before her. She raised her eyes to see the cause, and saw the light east and ahead of her was out. The sidewalk was wet from recent rain, and it was very dark. She then took a couple of steps and fell off the south side of the walk, between it and the fence, and broke her leg just above the ankle. For several years she had known the location, height and condition of this sidewalk, and had traveled over and along it frequently. The east lamp she referred to, and said was not lighted, stood about the distance of a block east from the lamp at the corner. Two witnesses contradicted appellee and testified both of these lamps were lighted, and burning brightly that night. The sidewalk was twenty-three to thirty inches above the level at place of accident, and had been raised there eight inches higher than its height when constructed, because after heavy rains, water would flow over it as originally built. The walk was between two feet ten inches and three feet wide, where appellee fell off. There were no guard rails at the sides, but otherwise the walk was well constructed, in good repair and safe condition. The street lamps used were of approved pattern, in good order, and when lighted furnished bright light. There was a sharp conflict in the evidence upon material points, and the case is a close one on the merits, hence the instructions given should have been accurate.

Plaintiff's seventh instruction given, is as follows: The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a city, which is in constant use by the public, has a right, when using the same with due diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel, day or night, throughout its entire width and length, and that the city has taken all reasonable care to put it in such a condi-

tion as to prevent injury to persons passing over the same with necessary lights or signals in the night time to designate places of danger and assist the traveling public in passing over such places of danger in a reasonably safe manner. This instruction ignores the material fact that plaintiff knew the condition of the sidewalk. It is not the law that a person knowing a place to be dangerous, has a right to presume such place to be safe, and act upon that presumption.

Furthermore, the only place averred in the declaration to be dangerous, was the sidewalk where the plaintiff stepped off, because it was elevated and without guard rails. Hence, if the jury found the instruction applicable at all, they must have understood from the language used, "such places of danger," that they were instructed, either as a matter of fact, or in the eye of the law, the sidewalk so constructed at said place, was a place of danger. If by the instruction the court assumed, as a matter of fact, it was a place of danger, and intended to so instruct the jury, then the instruction invaded the province of the jury, who alone were empowered to find the facts. If, on the other hand, the jury understood they were instructed that in law the sidewalk so constructed was a place of danger, they were erroneously instructed and misinformed. Constructing a sidewalk, elevated above the surface thirty inches, and without guard rails, is not negligence *per se*, nor conclusive evidence that such sidewalk, where it is so constructed, is a place of danger. *Smith v. City of Gilman*, 38 App. Ct. 394-5.

The tenth instruction given for plaintiff is as follows :

The jury is instructed that it is the duty of the corporate authorities of a city to provide, maintain and keep lights or signals burning in the night time at all known places of danger in its sidewalks, to prevent injury to the persons passing upon and over said dangerous places in such sidewalks, and a failure so to do would be negligence, and would render such city liable in damages to any one injured by reason thereof, provided such persons so injured were using

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ordinary care and caution in passing over such sidewalks when so injured. Given.

Like the seventh, it assumes the place of injury was a place of danger, if it is applicable at all, and states, as a proposition of law, it is the duty of the city to maintain and keep lights or signals burning at such place of danger, and a failure to do so would be negligence, and render the city liable. From this instruction the jury might have understood it was not sufficient that the city had provided a good street lamp at the corner where plaintiff turned east, furnishing light sufficient for her to see the sidewalk and ground on each side, but if, in addition to that, it did not place a light or signal at the place where she stepped off, the city would be liable. We think to so hold, would require the performance of a duty by the city not exacted by the law. There are cases, doubtless, where such signals or lights at the very place of danger might be necessary in the night, as for instance, where there was a hole, or excavation, or obstruction in the street, but the evidence in this record does not disclose such a case. The instructions we have criticised were calculated to mislead and misdirect the jury, to the prejudice of defendant, and for the error in giving them, the judgment is reversed and the cause remanded.

Louisville, E. & St. L. Consolidated R. R. Co. v. John Kloes.

1. NEGLIGENCE—*A Question of Fact for the Jury.*—It is a question of fact for the jury to determine whether the negligence charged in a declaration for personal injuries is proven by the evidence.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

G. & G. A. KOERNER, attorneys for plaintiff.

KNISPEN & ROPIEQUET, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee was injured at a railroad crossing under the following state of facts: The road ran east and west. He was approaching the crossing from the north. The first track reached was a switch track, on which were standing box cars on each side of the crossing and near thereto. The highway being lower than the railroad, the box cars obscured the view of a passenger train, which was backing down on the main track at a rate of about ten miles an hour. As his horse passed the box cars, the rear end of the train being about twenty-five feet away, appellee checked up and attempted to back his horse away from the track, at which time a shrill whistle was sounded, which, it is alleged, caused the horse to suddenly turn, upset the buggy and throw the appellee on the ground with such force as to seriously injure him.

There is a conflict in the evidence as to whether the bell was sounded continuously as the train approached the crossing, as required by the ordinances of the city of Belleville, where the accident happened. There is also a conflict in the evidence as to the care used by the appellee in approaching the crossing. The conductor claimed that he was on the rear platform and called to appellee in time to have prevented the accident had he been paying attention. The appellee and a man with him claimed they were paying close attention and were listening and looking for a train. It is quite evident the conductor could not have seen the horse or man in the buggy until they were nearly on the track, for the reason the box cars were near the crossing, on a track that was only a few feet from that on which the train was backing. One count of the declaration alleges, that the shrill whistle of the engine was negligently given at the very time the crossing was reached, which frightened the horse and caused him to make the sudden turn. There is evidence to support this count. There is also evidence to

support the count of the declaration charging that a bell was not rung or kept ringing, as required by the ordinances of the city. It was wholly a question of fact for the jury to determine whether the negligence charged in either of these counts was proved. No error of law is perceived in the instructions. The judgment is affirmed.

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152-144

**Mobile and Ohio Railroad Company v. Fannie Massey,
as Administratrix of the Estate of John
T. Massey, Deceased.**

1. RAILROADS—*A Blind Station Defined.*—A blind station is a station at which there is no station house agent, or operator.

2. FELLOW-SERVANTS—*Conductor of a Construction Train and Workmen upon it.*—A conductor had entire charge of the movements of the construction train and also of the workmen, whom he hired and discharged at pleasure. His relations, therefore, to the workmen, was that of master, in respect to every duty they owed the company. He ordered them to get on and off the train, to work when and where as he desired; disobedience was at the peril of discharge. *It was held* his commands were in contemplation of law the commands of the company, and that the company was responsible for the consequences. The relation is that of master and servant, and not that of fellow-servants.

3. NEGLIGENCE—*Master Liable for Negligence of His Servant.*—If one servant is injured by the negligence of another, who at the time stands in the relation of the master to the injured servant, the company is liable.

4. NEGLIGENCE—*Master Liable for His Servant.*—*Application of the Rule.*—A conductor of a construction train, with workmen under him subject to his orders, and whom he employed and discharged at his pleasure, being at work upon the track with his train, received from the train dispatcher a notice of an approaching train and an order to protect it. He misread the order and so got the impression that the train was coming from the opposite direction from which it really was. Having completed his work at the point where he was, he ordered his men on board and started, as he supposed, ahead of the train he was to protect. A collision was the result. *It was held* that the company was liable.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Declaration in case, plea not guilty; trial

M. & O. R. R. Co. v. Massey.

by jury; verdict for \$2,500 and judgment for plaintiff; defendant appeals, etc. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

STATEMENT OF THE CASE.

On the 10th day of December, 1891, the appellant was operating a work train in removing earth from a cut on its railroad, between Jonesboro and Mountain Glen, Illinois. The train was composed of an engine and three flat cars. The train crew consisted of a conductor, an engineer, a fireman and a brakeman. In addition to the train crew proper, there were from twelve to fifteen shovelers or laborers who loaded the earth upon and unloaded the same from the train. These laborers would load the earth upon the flat cars, and would then get upon them and ride to the place where the earth was to be unloaded, and with their shovels unload the same. These laborers were boarded by appellant in a boarding car or cars, stationed at Mountain Glen. In going from their boarding cars to their place of work, and in returning from their place of work to their boarding cars, they would ride upon said flat cars. B. F. Rathwell was the conductor of said work train, and R. B. Cutler was the engineer thereof. In addition to being conductor of said train, the said Rathwell was foreman of said laborers, having the power and authority to hire and discharge them. He had entire charge of the train and the men. There was but one railroad track between Jonesboro and Mountain Glen, and that was the main track of appellant. There was but one switch or side track between Jonesboro and Mountain Glen, and that was a blind station called Kaolin. A blind station, is a station at which there is no station house, agent or operator. There was no telegraphic station between Jonesboro and Mountain Glen. It is six and eight-tenth miles from Jonesboro to Mountain Glen. The cut in which the work train was being loaded with dirt is about one and a half or two miles south of Mountain Glen, and about five miles north of Jonesboro. The switch at Kaolin was about one-half of a mile north of said cut and about a mile or a mile and a half south of Mountain Glen. The work train had to stand upon the

main track while it was being loaded with dirt in the cut, and it had to pass over the main track in hauling the dirt from the cut to Mountain Glen and in returning to the cut. The only way of notifying said work train of the coming of an extra train, was to send a telegraphic train order from the train master's office at Murphysboro, to a telegraphic station, directed to the conductor and engineer of said work train, in care of the conductor and engineer of a particular train known to be due by the conductor and engineer of said work train.

A copy of this telegraphic train order would be delivered by the operator receiving it to the conductor and engineer of the particular train in whose care it was sent, and they would take it and deliver it to the conductor and engineer of the work train. This was the manner provided by appellant's rules for the delivery of train orders to a train at a non-telegraphic station. Engine 53 is the engine which hauled said work train. This work train had to protect daily against eight or ten trains of the defendant. On said 10th day of December, 1891, appellant ran an extra freight train, known as extra 88 south, from Murphysboro, south. Murphysboro is north of Mountain Glen.

Extra 88 south, had to pass the cut in which the work train was loaded with dirt. The train dispatcher at Murphysboro sent a train order to Jonesboro, directed to the conductor and engineer of engine 53, the work train engine, care of No. 32, a regular north bound freight train, to protect for extra 88 south, after 4:30 p. m. This train order was received by the operator at Jonesboro at three o'clock p. m., on the 10th of December, 1891. One copy of this train order was delivered to John Lewis, the engineer, and two copies of the same were delivered to C. A. Larber, the conductor of No. 32, by the operator at Jonesboro, to be delivered to the conductor and engineer of engine 53, the work train engine. The work train ran with a load of dirt from the cut into Mountain Glen, a short distance ahead of No. 32, and went upon a switch track there, so that No. 32 could proceed north. When No. 32 reached Mountain Glen

it stopped its caboose, being then between two and three hundred yards from the engine of the work train. The engine cut loose from the train and went up to the water tank to take water, leaving the conductor in the caboose. When the engineer of No. 32 had taken water, he pulled up opposite the engineer of No. 53, the work train engine, and handed him his copy of the train order to protect for extra 88 south, after 4:30 P. M.

At the time that this copy of said train order was delivered to the engineer of the work train by the engineer of No. 32, the conductor of the work train was standing upon a flat car just back of the tank of engine 53. This train order was delivered by the engineer of No. 32, to the engineer of the work train about 3.45 P. M.

This copy of the order belonged to the engineer of the work train. The engineer of the work train made a mistake in reading said train order. He read the word south in the order north. Said order was to protect for extra 88 coming south. The engineer, by mistake, read the order to protect for extra 88, coming north. The conductor of the work train asked the engineer of his train, what the order was. The engineer held the order up in his hand and told him that it was an order to protect against extra 88, north after 4.30 P. M., and told him to come and get it. The conductor said, "All right, I will be there." He did not go and get the order, as it was his duty. The rules of the company required him to compare this order with the engineer's. At this time the engineer of the work train had but one copy of the order, and that was the copy which had been delivered to him by the engineer of No. 32. The conductor of No. 32, had not yet delivered his copies of the order to the work train. No. 32 was composed of an engine, sixteen freight cars and a caboose.

When the engineer of No. 32 had delivered his copy of said order to the engineer of the work train, he went back and coupled onto his train and started north with the same. Just as the work train was pulling out from the switch at Mountain Glen, the conductor of No. 32, from the caboose

of his train, handed the engineer of the work train two more copies of the order to protect for extra 88 south, after 4:30 P. M. The conductor of the work train was at the switch stand, about three or four hundred feet north of the train, for the purpose of throwing the switch, to let his train upon the main track, when the conductor of No. 32 delivered his copies of said order to the engineer of the work train. The work train then went back to the cut for the purpose of being again loaded with dirt, getting there about four o'clock P. M. When the work train reached the cut, the conductor, thinking from what his engineer told him, that extra 88 was coming from the south, sent his brakeman south of the work train to flag extra 88. The manner provided by appellant's rules for protecting one train against another, was to send a flagman from the train to be protected in the direction from which the train to be protected against was coming, sufficiently far to enable him to stop the latter before it reached the former. The conductor and engineer of extra 88 south, had also been duly notified by appellant's train master not to pass Mountain Glen until 4:30 P. M., and to look out for the work train protecting between Mountain Glen and Jonesboro. When the work train was about ready to start for Mountain Glen, the conductor called in the flagman, said "All aboard," got upon the engine with the engineer, told the engineer to let her go to Mountain Glen, and at about 5:25 o'clock P. M. the work train started from the cut toward Mountain Glen with its last load of dirt for that day. It had gone about a quarter of a mile from the cut when it collided with extra 88 south, running at the time about thirty-five miles an hour. The conductor was on the engine. They jumped before the collision. The plaintiffs, James Massey and Dennis Godfrey, and the plaintiff, Fannie Massey's intestate, John T. Massey, are three of the laborers who loaded the flat cars of the work train, and they were riding upon said flat cars at the time of said collision. They were injured by the collision, John T. Massey afterward dying by reason of his injuries. James Massey's declaration contains three counts, all of which are substantially the same. The dec-

laration in the three cases are all based upon the foregoing facts.

LANDSEN & LEEK, attorneys for appellant.

JOHN BAIN, attorney for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

There are three cases pending in this court, wherein judgment was rendered against appellant, on substantially the same state of facts, about which there was no dispute. They raise the legal question of the proper application of the doctrine of fellow-servants. If that doctrine applies to the facts, the defense is full and complete; if not, there is, no defense on the merits. The facts show that Rathwell, the conductor, had entire charge of the movements of the construction train, and also of the workmen, whom he hired and discharged at pleasure. His relation, therefore, to that crew of workmen was that of master in respect to every duty they owed the company. He ordered them to get on and off the train to work, when, where, and as he desired; disobedience was at the peril of discharge. His duty was to read, compare with the engineer, and personally know the contents of telegraphic orders sent directing the movement of his train. It was, therefore, gross negligence on his part to order the crew of workmen aboard his train and run it in a direction which he should have known would almost inevitably cause a collision. It can not be asserted, on his behalf at least, that his failure to perform a plain and exigent duty, which, if done, would have avoided the collision and the resulting injuries, was not negligence. It can be, however, on behalf of the company, if at the time of the collision his relation to the laborers who were injured, was that of a fellow-servant. While these men were at work in the cut, or dirt-pit, had Rathwell, with the relation he sustained to them, been guilty of a like degree of negligence in giving an improper order—when he should have known the proper order to give—which resulted in their injury, the company

would clearly be liable, for the reason his orders, in such case, would be essentially the orders of the employer. C., B. & Q. R. R. Co. v. McLellan, Admr., 84 Ill. 109, at p. 116. He would not, in such case, have been a fellow-servant.

As is said in the May case, 108 Ill. 299, and Hawk case, 121 Ill. 263: "When a railway company confers authority upon one of its employes to take charge and control of a gang of men, in carrying on some particular branch of its business, such employe * * * is the direct representative of the company itself. * * * When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." It is there further said: "The fact that he may have an immediate superior standing between him and the company, makes no difference." See also Wombacher case, 134 Ill. pp. 63, 64, and cases there cited. The above presents the uniform doctrine of this State where the injury results from the negligence of an employe standing in the relation of a master to those injured. It being clear that Rathwell stood in that relation to the men injured while at their work in the dirt-pit, did that relation change after they had ceased such work at his command, and were aboard the cars, by his order, of a train being negligently run, by his direction, to almost certain destruction? In the case of C., B. & Q. R. R. Co. v. Blank, 24 Ill. App. 438, where the conductor, Wm. Henry, who had like control over the construction train and its gang of twenty-seven men as in the case under consideration, gave an improper order as to the operation of the train while the men were aboard, whereby two of them were thrown from the cars, run over and killed, the company was held liable under the authorities above referred to. The company did not take an appeal. This case determines the law of the relation is not changed by the fact that the men are aboard the cars, when an injury results from a negligent order given by such superior in the operation of the train. No reason is perceived why it should.

When the relation of an employe is determined to be that of master, and the servant's injury is the direct result of such employe's negligence, as the proximate cause, the principal is liable. We know of no exception to this rule. *Wombacher case, supra*. It is no more of a defense to set up that Rathwell, the conductor and vice-principal, was misled into giving the negligent order by Cutler, the engineer, than it would have been in the *May* and *Hawk cases, supra*, that Frick and Button, who were vice-principals, were misinformed by some subordinate. Rathwell's ignorance of that which it was his duty to know, is no defense. Nor is it any defense that Rathwell was, at the time of the collision, operating the train in direct violation of a specific order of the company. Had Rathwell, against the express order of his principal, negligently worked his crew under an overhanging and dangerous bank, which fact he should have known, but was not known to the men, which bank fell upon and injured them, the company would have been clearly liable. As is said in the *May case*, the fact he had an immediate superior, who had the right to, or even did, command him, makes no difference, when he stands in the relation of master to the men injured by his negligence. The appellant relies chiefly on the *Abend case*, 111 Ill. 202, as holding that Rathwell and the men injured, were fellow-servants. In that case, it will be observed the engineer, who is also said to have been conductor, whose negligence caused the injury to the workman riding on the engine, in violation of known rules of the company, did not stand in the relation of master. The same is true of the *McDonald case*, 21 Ill. App. 409, and of all the cases cited in the *Abend case*. We do not deem it necessary to review cases cited from other States, for we understand our Supreme Court holds, that if one servant is injured by the negligence of another, who at the time stands in the relation of master, the company is liable. The conclusion reached being adverse to appellant, it is not deemed necessary to consider points raised as to the introduction of evidence, or the giving and refusing instructions, which do not affect the quantum of damages. The judgment is affirmed.

52	564.
58	184.
155.	78.

Mobile & Ohio Railroad Company v. Denis Godfrey.

1. DAMAGES—*Verdicts for Excessive—When Not Disturbed.*—On appeal, courts seldom substitute their judgment for that of the jury in estimating the damages without it is apparent the jury was influenced by prejudice or passion.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

LANDSDEN & LEEK, attorneys for appellant.

SMITH, McELVAIN & HERBERT, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The same questions arise in this case as in that of appellant against James Massey, except that relating to the damages awarded, which are claimed to be excessive. The evidence shows that appellee is a physical wreck since his injury. Before that time he was a sound, healthy man. It is very difficult to measure the damages for such an injury. On appeal, courts seldom substitute their judgment for that of the jury in estimating them, without it is apparent the jury was influenced by prejudice or passion. There is nothing in this record to indicate the jury was so influenced, without it is to be found in the amount of the verdict returned; while that amount is large, yet, in view of the helpless condition of appellee, and the pain and suffering he endures, we do not feel that we should substitute our judgment for that of the jury and the court below. For reasons stated in the Fannie Massey case, the judgment is affirmed.

Louisville & St. L. Consolidated R. R. Co. v. Edward Gobin, by Elizabeth Gobin, his Next Friend.

52	565
98	262

1. **NEGLIGENCE—*Speed of Trains Regulated by Ordinance.***—It is negligence in a railroad company to run its trains at a greater rate of speed within the limits of a city, than is allowed by the ordinances.

2. **JURY—*Judges of the Weight to be Given to Testimony.***—It is the province of the jury to judge what weight and credit should be given to the testimony of the witnesses, and find accordingly, and unless such finding is so contrary to the evidence as to create the belief in the mind of the court that the jury misapprehended or disregarded the evidence, the verdict will not be disturbed.

3. **EVIDENCE—*Speed of Trains.***—Any person may testify as to speed of train, whether he is a railroad man or not, and state his opinion, based upon his observation of the train while in motion. The weight to be given to such testimony is for the jury to determine.

4. **NEGLIGENCE—*Speed of Trains—Cause of Injury.***—Where a railroad company, by itself or agents, runs its trains at a greater rate of speed in or through the incorporated limits of a city than is permitted by the ordinances of such city, such company is liable for all damages done the person or property by such train, and the same is presumed to have been done by the negligence of such company or their agents. It is not necessary to prove that the injury was the direct result of such unlawful rate of speed.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, G. & G. A. KOERNER AND FRED. B. MERRILLS, ATTORNEYS.

A railroad corporation is not liable for every accident which may occur upon its right of way, or upon its trains. *City of Chicago v. Gavin*, 1 Brad. 360; *Gavin v. City of Chicago*, 97 Ill. 70.

The liability must have for its foundation, either some wrongful act, or negligence or default on the part of the corporation or its servants or agents. *Chicago & A. R. R. Co. v. Becker*, Admr., 76 Ill. 30.

Before a person can recover on account of the neglect of a statutory duty, it must appear that the injury complained of was the result of such neglect and that the injured party exercised due care. *Chicago B. & Q. v. Johnson*, Admx., 103 Ill. 512; *Wabash St. L. & Pac. Ry. v. Thompson*, 15 Brad. 116; *St. Louis A. & T. H. R. Co. v. Andres*, 16 Brad. 292.

To render appellant liable for damage flowing from its negligence, it must be shown that the damage was the ordinary or probable consequence of the act.

APPELLEE'S BRIEF, B. H. CANBY AND M. D. BAKER,
ATTORNEYS.

"The killing and the violation of the ordinance were proved, and thus a *prima facie* case of negligence was made out against the company. The *onus* was thrown upon it to rebut the presumption of law arising upon the facts proved. The evidence failed to remove the presumption, and there is no escape from the liability, for the jury might fairly attribute the killing to the speed of the train." *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91; *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Lake Shore & M. S. R. Co. v. Berlink*, 2 Brad. 427; *Wabash R. Co. v. Weisbeck*, 14 Brad. 525; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellee, who sues by his next friend, was a child five years and seven months old when injured. He lived with his mother, who was a widow, and supported appellee and her three other children by her labor. She lived in East St. Louis, in a house the rear of which faced Railroad street, a public street of that city, upon and along which appellant's track was located at the time of the accident, about 2 o'clock P. M. of November 4, 1890.

Appellee was found with one leg lying over the rail and the rest of his body outside the rail of appellant's road in said street, and a short distance from his mother's house. His leg was so crushed and mangled that amputation became

necessary. Immediately before he was picked up, appellant's freight train consisting of engine and eighteen cars had passed over said track at the place he was found. The averments of negligence in the declaration which were traversed and issue joined thereon were: 1st. That defendant's train was run in and upon a public street in the city of East St. Louis, at a speed greater than six miles an hour, in violation of a city ordinance limiting the speed of freight trains to six miles an hour. 2d. That appellant's servants in charge of said train saw, or by exercising due care and diligence, might have seen appellee in time to avoid the injury, but failed to exercise such care or diligence. The jury returned a verdict finding defendant guilty and plaintiff's damages \$3,000. Judgment was entered on the verdict for that amount and costs, and defendant took this appeal. The right to recover by reason of the negligence first charged is based on paragraph 87, Chap. 114, 2d Starr & Curtis Stat.

The statute provides: "Whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive, engine or car, and the same shall be presumed to have been done by the negligence of said corporation or their agents."

On behalf of appellant, it is said appellee failed to prove by a preponderance of evidence the material averment that the speed of the train at the time of accident exceeded six miles an hour, and furthermore even if the proof did show a violation of the city ordinance in that regard, yet it must also appear, from the evidence, that the accident was the result of such violation.

The evidence as to speed was conflicting. Three witnesses for appellant testified it was not more than three or four miles an hour; a like number for appellee testified the

train was running at a speed of eight to nine miles an hour; each witness disclosed the means and opportunity he had for observing and judging the speed, and the jury saw and heard them, and could observe their demeanor, conduct and appearance while testifying, and it was the peculiar province of the jury to judge what weight and credit should be given to the testimony of the several witnesses, and find accordingly, and unless the finding is so contrary to the evidence as to create the belief in the minds of this court that the jury misapprehended or disregarded the evidence, we ought not to disturb their verdict.

The contention of counsel that the testimony of appellant's witnesses was entitled to more credit because of their knowledge and experience as railroad men, is not tenable as a legal proposition. While the fact of their possessing such knowledge and experience might very properly be considered by the jury in determining what weight should be given to their testimony, other facts and circumstances surrounding them, as disclosed by the evidence, also proper to be so considered by the jury, might materially affect the credibility of their testimony. Our Supreme Court have said, in *C. & Q. R. R. Co. v. Johnson*, 103 Ill. 512, any one can testify as to speed of train, whether a railroad man or not, and state his opinion, based upon his observation of the train while in motion. The weight to be given to such testimony is for the jury to determine. We are satisfied the evidence warranted the jury in finding the speed of the train at time of accident exceeded the rate as limited by the city ordinance.

It is said on behalf of appellant, even if defendant did so run its train in violation of said ordinance, yet the evidence does not show the accident was the result of such violation, and therefore plaintiff could not legally recover.

Such proof was unnecessary by the very terms of the statute. After reciting that whenever any railroad corporation shall, by itself or agents, run any train at a greater rate of speed in or through the incorporated limits of any city than is permitted by any ordinance of said city, next

follows these words: "Such corporation shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive engine or car, and the same shall be presumed to have been done by the negligence of said corporation or their agents."

The person aggrieved in this case was a child. Edward Gobin, the appellee; he received serious injury to his person and was damaged. There can be no serious doubt that he was so injured and damaged *by defendant's train*, then being run at a rate of speed in violation of the ordinance. Casey, a witness for appellee, saw this train as it passed. He was working at a house in front of which was defendant's track and was fixing a ladder on the side of the house to go up for the purpose of painting. As the last car passed him he heard the cry of the child and went immediately to where it lay, a distance of about one hundred feet, and found appellee with one leg over the rail and the rest of his body outside the rail over which defendant's train had just passed, and the child's leg was crushed and mangled. The fair inference from these facts is, that the train which had just passed injured and damaged appellee. The presumption mentioned in the statute was thus established by the proof, and no countervailing evidence having been introduced, the jury were justified in finding the defendant liable under the first count. It is also urged that the negligence of appellee's mother in failing to care for and prevent the child from getting on defendant's track bars his right to recover. We think the evidence shows she used all the care the law required of her, circumstanced as she was, and also in this case where the suit is brought by the child for his own benefit, and not by the parent, the negligence of the parent can not affect his right to recover. *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370. It is further contended that there was no evidence to sustain the charge in the fourth count of negligence, on the part of defendant's servants, in failing to exercise due care and diligence to look out ahead as they were operating said train. If this were so, yet if the negligence charged in the first count was proven, and appellant's

liability established under that count, as we hold was done, the verdict was right.

It was not essential to a recovery that the material averments in more than one count should be proven. But we are not prepared to hold, after examining all the evidence in the record, that there was no evidence to sustain the charge of negligence in the fourth count. The child was evidently on, or near defendant's track as the train approached it, and it was in the daytime, with nothing to obstruct the view of those in charge of the train; hence, the jury might have well doubted that defendant's servants were using care to look ahead, but, on the contrary, were negligent in that regard, or they would have seen the appellee in time to stop the train and avoid the accident. The refusal of the court to give the fourth and fifth instructions for defendant below, is assigned for error. We perceive no error in this ruling of the trial court. The fourth instruction did not announce the law correctly, as applied to the facts in this kind of case. The fifth instruction was properly refused. The jury were fully and fairly instructed upon all the matters of law embraced in that instruction, in the second instruction given for plaintiff. No sufficient reason appearing for reversing the judgment below, it is affirmed.

Tompkins and Garrison v. James Gerry, for use of J. R. Creighton and E. C. Kramer.

1. **PRACTICE—Waiver of Replication.**—Where no replication is filed and both parties appear and go to trial without objection, the same as if the replication were in, such omission can not be urged as sufficient cause to require a reversal of the judgment.

2. **PARTIES—Suit upon an Appeal Bond.**—Where a judgment appealed from is assigned after its affirmance, it is proper to bring a suit upon the appeal bond, in the name of the obligee, for the use of the assignee.

3. **SET-OFF.**—Where a final settlement has been made of all accounts between parties and the amount found due to one party, which the other agrees to pay, and suit is brought and judgment recovered for the

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amount. an appeal having been taken, the party taking the appeal can not, in an action afterward brought upon the appeal bond, insist on setting off his original account, submitted in the settlement, to a recovery on the appeal bond.

Memorandum.—Debt on an appeal bond. Appeal from the Circuit Court of Wayne County; the Hon. CARROLL C. BOGGS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

BUNCH & BONHAM, attorneys for appellants.

CREIGHTON & KEAMER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages for the breach of condition in appeal bond given by appellants and another person, not served with process, on appeal by Tompkins from the judgment in justice's court to the County Court in the case of Gerry v. Tompkins, and from that court brought by Tompkins to this court on appeal. The judgment against him in the County Court was here affirmed, and the opinion filed June 21, 1892, nearly a year before the present suit was tried below, hence no appeal in the case of Gerry v. Tompkins was pending at the time of said trial, as appellants insist. Appellants also contend that this suit on the bond and a suit of Tompkins v. Gerry were consolidated and tried as one case in the Circuit Court, and that the amount of the account sued for in the latter case ought to have been allowed as a set-off against Gerry's judgment. This contention is not supported by the facts. In each case a separate transcript of the record is sent up. In each transcript it is recited "this cause" was turned by the court by agreement. In the case at bar the court found \$246.93 damages for the breach of condition of the bond, and entered judgment for that sum against Tompkins and Garrison, the obligors who were served with process. In the case of Tompkins v. Gerry, the court found for the defendant and

entered judgment against Tompkins for costs of suit. It thus appears a separate trial of each case was had; the findings were separate, separate judgments were entered, and separate transcripts are before us for examination. It is also insisted on behalf of appellants that replications to defendant's pleas were not interposed, and for that reason judgment should have been for them; but both parties appeared and went to trial without objection, as though replications were in, and appellants can not now urge such omission as sufficient to require a reversal of the judgment. *Douglas v. Matson*, 35 App. Ct. Rep. 537; *Strohm v. Hayes*, 70 Ill. 41; *Shreppler et al. v. Nadelhoffer*, 133 Ill. 536.

We discover no error in the rulings of the trial court in admitting evidence on behalf of plaintiff, or in refusing to admit evidence offered by defendants. The propositions offered by appellants, which the court refused to hold as the law, were properly refused. We are satisfied the proof warranted the finding of the Circuit Court. Plaintiff below introduced and read in evidence the appeal bond sued on, executed by appellants and J. A. Carrothers, who was not served and did not appear. Also, the judgment in justice's court, County Court and this court, and fee bills, showing that the amount of judgment in the County Court recovered by Gerry against Tompkins, affirmed in this court, with interest and costs, was \$246.83, which judgment and costs the parties agreed in open court amounted to that sum, and that said judgments of justice's court, County Court and this court were regular and correct. The assignment of the judgment after its affirmance by this court to Creighton & Kramer was also proven, showing they had a beneficial interest in the proceeds when collected. The execution of the bond by appellants, the breach of its condition, and the amount of damages sustained by plaintiff because of such breach, were established by the evidence, and the court assessed the damages at \$246.93, and entered judgment against appellants for that sum and costs. No complaint is made that the damages assessed are excessive if Gerry had

the right to recover at all. But appellants insist the amount of an account against Gerry, sued for by Tompkins, in the case of Tompkins v. Gerry, referred to in this opinion, should have been allowed as a set-off against said damages. This contention we can not sustain.

We have held in the case last mentioned, heard on appeal at the August term, 1893, of this court, that before that suit was brought, a final settlement was made of all accounts between the parties, binding on both. That the balance found due Gerry on such settlement, was \$188.40, which Tompkins agreed to pay; that he had received credit in that settlement for all accounts he then claimed Gerry owed him, and by such credit his indebtedness to Gerry was reduced to the amount of \$188.40, the balance found due, and that Tompkins could not again recover the amount of accounts already so credited in the final settlement. The same reasons forbid the allowance of said accounts as a set-off in this case. We find no error justifying the reversal of the judgment against appellants, and the same is affirmed.

East St. Louis Ice and Cold Storage Company v. J. W. Crow.

1. NEGLIGENCE—*Who Is Responsible*.—Appellee, a servant in the employ of appellant, acting under the orders of its foreman, was engaged in unloading a barge loaded with stone. In the deck of the barge, and near him, was a hole from a foot to a foot and a half square, which was unprotected and exposed. Appellee, with his back toward the hole, had lifted a rock preparatory to throwing it overboard, when he stepped into the hole and fell with the rock upon his bowels. Appellant contended it was not responsible, because the barge was owned by a quarry company, and was being used by that company for the purpose of delivering its rock. But appellee being the servant of appellant and not of the quarry company, and receiving his injuries while acting for appellant and under its orders in unloading the barge, appellant was held liable.

2. NEGLIGENCE—*Which Party Guilty of, etc., a Question for the Jury*.—Upon the case stated, the jury were justified in finding from the evidence that appellant was guilty of negligence causing the injury, and that appellee was, at the time, in the exercise of ordinary care.

3. EMPLOYEES—*Right To Assume the Reasonably Safe Condition of the Place They Are Ordered To Work in*.—Where an employe is ordered

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to work in a place, and where he has no time to examine it, he has a right to assume that it is in a reasonably safe condition.

4. MASTER AND SERVANT—*Construction of the Terms*, “Bound to Furnish a Reasonably Safe Place” and “Bound to Exercise Reasonable Care” to Do So, etc.—The expressions, “bound to furnish a reasonably safe place,” and “bound to exercise reasonable care to furnish a safe place,” mean practically the same thing, and neither of them can be held to require an absolutely safe place to be furnished.

Memorandum.—Action for personal injuries. Appeal from the City Court of East St. Louis; the Hon. BENJAMIN H. CANBY, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

Plaintiff's instruction, the giving of which is assigned for error:

The court instructs the jury that a corporation is bound to exercise reasonable care to furnish a safe place in which it requires its servants to work, and that a person entering its employment has a right to presume that the company has discharged its duty in this behalf, and if the jury believe from the evidence that the floor of the barge upon which the defendant required plaintiff to work was at the place and time of the injury in question in a defective and dangerous condition, as charged in the declaration, and was unsafe for the purpose for which it was used by the defendant, and that the defendant had notice thereof before said injury, or by the exercise of reasonable or ordinary care might have had notice thereof before said injury, and negligently failed to use ordinary care to make it reasonably safe, and that by reason thereof the plaintiff, without notice of such unsafe condition of the floor of said barge, while in the discharge of his duty, with due care and caution for his personal safety and to prevent injury, was then and there injured, as charged in the declaration, then the jury will find for the plaintiff and assess his damages at such sum as they believe from the evidence to be a just compensation for the injury so received, not, however, to exceed the amount sued for.

CHARLES W. THOMAS, attorney for appellant.

ALEX. FLANNIGEN and JESSE M. FREELS, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant, through its foreman, John Sheehan, ordered appellee and others to unload a barge, lying on the east side of the Mississippi river, in the city of East St. Louis.

The barge, except as to the hatchways and a narrow passageway at the edge of the deck, was covered with rock. Near this passageway, on the north third of the barge, was a hole, from a foot to a foot and a half square, which was also exposed. Appellee, with his back toward the hole, had lifted a rock preparatory to throwing it overboard, when he stepped into the hole and fell with the rock upon his bowels.

He sustained serious injuries, some of which are probably permanent. He recovered a judgment for \$2,000.

Appellant contends that it is not responsible for the injuries to appellee, for the reason that the barge was owned by the Grafton Quarry Company, and was being used by that company for the purpose of delivering rock to appellant. But appellee was the servant of appellant, and not of the Grafton Quarry Company, and received his injuries while acting for appellant and under its orders in unloading the barge. In such a case, it is not a defense to show that the barge was not appellant's property. *Sack v. Dolese et al.*, 137 Ill. 129; *O. & M. Ry. Co. v. Wangelin*, 43 Ill. App. 324.

It is urged that appellee's opportunity to learn the condition of the barge was, at least, equal to appellant's, from which it is said to follow that the latter should not be charged with a greater degree of negligence than the former, and consequently should not be held answerable in damages for the accident. We do not agree with appellant in this view of the evidence. We think the jury were justified in finding from the evidence that appellant was guilty of negligence causing the injury, and that appellee was, at the time, in the exercise of ordinary care.

Appellant's superintendent was on the barge on the day before the accident, assisting in the measurement of the rock. If he had been as careful for the well being of the employes of the company, as he was to prevent an overcharge for rock, he would have examined the deck and would have discovered this hole. He said he saw no openings in the deck but the hatchways. This being true, he could not have made an examination to ascertain the condition of the deck.

Appellee did not see the hole when he went upon the barge on the following day. In obedience to the order of appellant's foreman, he began throwing rock overboard. He had no time for the examination of the barge. He had a right to assume that it was in a reasonably safe condition. Hence, we conclude that the jury were justified in finding appellant guilty, and appellee not guilty, of negligence.

Only one instruction was given for appellee and this is criticised. The first clause of the instruction is as follows: "A corporation is bound to exercise reasonable care to furnish a safe place in which it requires its servants to work." It is said that the use of the word corporation is sufficient to render the instruction "eminently invidious and unfair." True it is that a corporation is not required to use a greater degree of care for the safety of its employes than would be exacted of an individual under the same circumstances. But we can not believe that the verdict would have been for a less amount, or in favor of appellant, if the obnoxious word had not been used.

In other words, we think that the statement that a corporation is bound to exercise reasonable care, while not to be commended, was not productive of injury to appellant's case under the circumstances.

It is also said that this instruction required the company to furnish an absolutely safe place for its servants to work in. This is a misconception of the meaning of the language of the instruction. To say that appellant should "exercise reasonable care to furnish a safe place," is equivalent to saying that appellant is required to furnish a "reasonably safe place." These two forms of expression are used indifferently and interchangeably, in many well considered cases in the Illinois Reports, the first occurring in one part of an opinion, and the second in another part of the same opinion. See C., R. I. & P. R. R. Co. v. Lonergan, 118 Ill. 41, and C. & A. R. R. Co. v. Kerr, 148 Ill. 605; 35 N. E. Rep. 1117.

The following quotation from the opinion in the Lonergan case sufficiently illustrates what has been said: "It is also a well settled proposition in this and in the courts of

other States, that a railroad company is not bound to furnish absolutely safe machinery for its employes. The law imposes upon the company the obligation *to use reasonable and ordinary care and diligence in providing suitable and safe machinery*, tracks and switches, engines, etc., for the use of those engaged in its service. The machinery and other devices furnished the employe in operating the road, are not required to be the best, or the most improved kind, or to be absolutely safe. *It is sufficient if the same are reasonably safe.*" In our opinion, the expressions italicized in the above quotation, mean practically the same thing, and either of them may be properly used in an instruction in a case like the one at bar.

We find no error in the refusal or modification of appellant's instructions. The damages are not excessive. The judgment is affirmed.

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City of Carlyle v. The Carlyle Water, Light & Power Company.

1. **WATER COMPANIES—*Business of, Impressed with a Public Interest.***—The proprietors of a water supply system, carrying on a business which is impressed with a public interest, must serve all who apply on equal terms and reasonable rates.

2. **CITIES AND VILLAGES—*Power to Contract for Water.***—The authority to contract, under Sec. 1 of the act to enable cities and villages to contract for a supply of water for public use, for a period not exceeding thirty years, and to levy a tax to pay for water so supplied (Laws 1871-2, 271), does not necessarily imply that the price of the supply should be fixed for the entire period, but that the supply should be provided for the entire time, the price to be determined from time to time, or on failure to agree, to be settled by the rules of the common law.

3. **CITIES AND VILLAGES—*Contracts for Water Supply.***—The contract by a city for a supply of water for public use for a period not exceeding thirty years, under the act of 1872 (Laws 1871-2, 271), is in the nature of long time contracts for certain articles or merchandise at market rates, not unusual in large transactions, but which are none the less contracts in the full legal sense of the term. The mere use of the term does not, of itself, necessarily signify that it is to be given an unrestricted

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meaning. On the contrary it should be restricted in its scope, so as to apply only to the subject-matter intended by the legislature.

4. CITIES AND VILLAGES—*Contract Fixing Water Rates*.—A contract by the city for a supply of water for public use, under the act of 1872, for a period not to exceed thirty years (Laws 1871-2, 271), which fixes a maximum rate for supplying the inhabitants of the city with water, in so far as it fixes a price for the entire period, is not binding on the city for the period named, but is binding until changed, as provided in the act approved June 6, 1891 (Laws 1891, 85), providing that in case unreasonable rates are fixed, the same may be revised and determined by the Circuit Court of the county, etc.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Clinton County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1898, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, J. J. MCGAFFIGAN AND B. H. CANBY,
ATTORNEYS.

"Whatever tends to prevent competition between those engaged in a public employment or business, impressed with a public character, is opposed to public policy, and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy." 1 Addison on Cont. 743; Greenhood on Public Policy, pages 180, 643, 654, 655, 670; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Craft v. McConoughy, 79 Ill. 346; Central R. R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah R. R. Co., 43 Ga. 13; Trans. Co. v. Pipe Line Co., 22 W. Va. 600; The People ex rel. v. Chicago Gas Trust Co., 130 Ill. 293.

No legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them again and again, as often as the public interests require. Such a body has no power, even by contract, to control and embarrass its legislative powers and duties. Cooley's Const. Lim. 206.

It has been decided in many cases that a municipal corporation can not, by contract or other act, abrogate or

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abridge its own legislative or discretionary powers. *State of N. Y. v. The Mayor of N. Y.*, 3 Duer, 131; *Gale v. Kalamazoo*, 23 Mich. 344; *Presbyterian Church v. Mayor*, 5 Cow. 538; *Davis v. Mayor*, 14 N. Y. 506; *Mihau v. Sharp*, 17 Barb. 435; *East Hartford v. Hartford Bridge Co.*, 10 How. 535; *State v. Cincinnati Gas. L. Co.*, 18 Ohio, 262; *Reynolds v. Shreveport*, 13 La. Ann. 426.

VAN HOOREBEKE & FORD and M. P. MURRAY, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee obtained a judgment of \$9,448.60 against the appellant for the rental price, as fixed by an ordinance, of forty-three fire hydrants. The finding of facts by the court is sustained by the record and all material questions of law raised by appellant except one, have been determined in suits between the same parties in regard to the same subject-matter; see 31 Ill. App. 329, 36 Ill. App. 28, 140 Ill. 445. The ordinance upon which this suit is based, is set out in full in 31 Ill. App., *supra*. It was passed on the 26th day of October, 1886, and the waterworks thereby authorized were completed according to contract on the 16th day of September, 1887, as held in 31 Ill. App. On the 26th day of May, 1886, appellant passed another ordinance, notice of which was served upon appellee, refusing to take or use any water for public purposes supplied by appellee, and none has been taken for that purpose since that time by the city's authority or consent. The original ordinance granted the right to the assignee of appellee by Sec. 1, to use the streets and alleys and other public ways and grounds of the present and future limits of the city of Carlyle for the purpose of laying down pipes for the conveyance of water in and through said city for the use of said city and its inhabitants. It further provides as follows: "Sec. 2. And said company, its successors and assigns, shall have the exclusive privilege of laying down pipes for conveying water in said city for the use of said city and its inhabitants for the term

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of twenty-one years from the date of the passage of this ordinance. Sec. 9. The city of Carlyle, by its city council, for and in consideration of the obligations imposed upon said company, its successors or assigns, by the foregoing sections, hereby agree to and contract with said company, its successors or assigns, to accept the forty-three hydrants stipulated in section 5 of this ordinance for the use of said city, as soon as the same are erected, connected with the water mains and supplied with water, and otherwise conform to this ordinance. And from that day to pay said company, its successors or assigns, the sum of \$48.83 per annum for each and every fire hydrant above enumerated, and for each fire hydrant attached to any extensions or additions to above system the sum of \$45 per hydrant per annum for and during the term of this franchise."

The ordinance also fixed a maximum rate of charges for water supplied to the inhabitants. The new question, as presented by appellant's counsel, is that the city council, passing the ordinance, could not contract to take water for public purposes at a certain price for a period of years and thereby interfere with the legislative and governmental power of future councils over that subject. When this question was heretofore presented the courts held, under the authority of *E. St. Louis v. E. St. L. G. L. & C. Co.*, 98 Ill. 415, that if the position was well taken, yet the city had not, by any recognized method, repudiated the contract, and that so far as executed, and the city had received the benefits thereunder, the contract was enforceable. The new ordinance of May 26, 1888, repudiating the contract made by the original ordinance, is now, for the first time, before the court, and as conceded by appellee's counsel, requires a decision of the question. The appellee contends that the city council had the power to make the contract as set out in Sec. 9 of the ordinance, under the express provisions of Sec. 1 of the act of 1872, *Starr & Curtis*, p. 545, which provides that "the city and village authorities * * * may contract with such incorporated company for a supply of water for public use for a period not exceeding thirty years." The

appellant contends that this statute is unconstitutional, and that it can not stand as a valid law at the same time with Sec. 1 of the act of 1891, Laws 1891, p. 85, which provides "That the corporate authorities of any city * * * in which any * * * corporation has been * * * authorized by such city * * * to supply water to such city * * * and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance, maximum rates and charges for the supply of water furnished by such * * * corporation to such city * * * and the inhabitants thereof—such rates and charges to be just and reasonable, and in case the corporate authorities of any such city * * * shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city * * * may be." That the legislature itself would not have the power to grant the "exclusive privilege" to appellee contained in the ordinance has been in effect decided in *The People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268. That question, however, raised by Sec. 5 of the ordinance, is unrelated to the legal question raised by Sec. 9 of the power of the legislature of the State to delegate the authority to the city to make such a *contract* as that provided for in the act of 1872.

As is said in the *Bull* case, 106 Ill. at p. 348, it is not a question of exclusive right, but of right at all to make such a contract as in said act provided. The city was authorized to provide its own water supply system by the act of 1873. Chap. 24, Art. 10, *Starr and Curtis*, p. 544; *Wagner v. City of Rock Island*, 146 Ill. 139. But it was not thereby authorized to discriminate or impose exorbitant rates, for in the *Wagner* case it is said: "It is a rule of the common law that parties carrying on a business which is impressed with a public interest, must serve all who apply on equal terms and at reasonable rates." That appellee is impressed with such interest is clear. This leads us to a construction of the act of 1872, and a determination of the kind of contract thereby authorized to be made. In doing so it

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is not necessary to determine the extent of the power of the legislature, which as the representative of the State is sovereign, except as restricted by constitutional limitations. The language of the act, so far as applicable to the point under consideration, authorizes cities to "contract for a supply of water for public use for a period not exceeding thirty years." It is well known such supply of water to cities is a great convenience, promotive of health, protective against the destruction of property by fire, and therefore a matter of public concern. This delegation of power to the city authorizes it to declare a stable public policy with reference thereto, which is a matter, so to speak, within one view, and provide by contract for such supply, which it must be presumed the legislature intended should be done, without interference with the exercise of governmental power by future councils, except as to such declaration of public policy and without interference with those natural laws which from time to time operate upon and affect the cost of supply and the price thereof.

If the authority "to contract" was construed to require the price of the supply for the entire period to be unalterably fixed, then as said in the 98th Ill., at p. 426, in a suit to recover the contract price of gas, where the price was fixed for a long period, "at first blush, such a contract may seem objectionable as unnecessarily tying up the hands of the city council for such a length of time." In the original opinion it was held this could not be done. The final opinion, as we understand it, does not withdraw from that view. This doctrine is reasserted in the case of *Milliken v. County of Edgar*, 142 Ill. 528, wherein it was held that a board of supervisors could not contract with the keeper of a poor farm for the period of three years. It is there said, at the time the contract was attempted to be made, "The members of the board of supervisors were elected annually. The board was clothed with authority to levy taxes to raise funds to support paupers, but this power was required to be exercised annually. * * * If this important power * * * may be so far delegated as was attempted in this case, the

county might be deprived, in a great measure, of one of the most important offices intrusted to its care and supervision." Several Illinois cases are cited as supporting this doctrine. The principle, that such contracts, as distinguished from contracts like those for the erection of buildings, etc., where the whole subject-matter is within one view, and relates to governmental, rather than mere contractual power, is firmly imbedded in the law of this State. This principle, however, is not a limitation upon the power of the legislature to delegate an authority to make such a contract as that provided for in the act of 1872, as we understand the effect of its provisions, considered in the light of that principle, but rather a limitation upon the power of the agent, the municipality, to make a contract not authorized by statute. The rules of law announced in the Wagner and Milliken cases, *supra*, are to be borne in mind as applicable to the character and relation of the parties to this suit, in construing the act of 1872.

It will not be presumed the legislature intended to change these wholesome rules of law, or that there is an irreconcilable conflict in the existing statutes of 1872 and 1891. Viewed from this standpoint, we hold that the authority "to contract for a supply of water for public use for a period not exceeding thirty years" does not necessarily imply that the price of the supply should be fixed for the entire period, but that the supply should be provided for the entire time, the price to be determined from time to time, or on failure to agree, to be settled by the rules of the common law. Such a contract would be like long time contracts for certain articles of merchandise at market rates, not unusual in large transactions, but which are none the less contracts in the full legal sense of that term. The mere use of the term does not of itself necessarily signify that it was to be given an unrestricted meaning. On the contrary it should be restricted in its scope, so as to apply only to the subject-matter intended by the legislature. This construction would give the company the exclusive right to supply water for public use the full period of the contract, with the

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implication of law impressed on its business to do so at just and reasonable rates, as might be determined from time to time by the company and the respective city councils. A failure to agree on the rate or price would not relieve the city from its obligation to take water for public use, but would remit the question before the act of 1891 to the courts, to be determined according to the common law rule, after that act, according to the method therein prescribed. The ordinance upon which this action is based, also fixed a maximum rate for supplying the inhabitants of the city with water; such rates, before the act of 1891, were subject to the same common law rule and thereafter came within the provisions of that act. To hold that the price could be fixed by the ordinance for water supplied for public and private use for a period of thirty years might impose a very great burden, and result in the unjust exaction of large sums of money. It is no answer to say the inhabitants are not required to take a supply of water from the company; as well say persons are not required to patronize railroads, hackmen, ferries, etc. Neither is it any answer to say that the company would not provide such supply unless the price was fixed for the entire period; for, its business being impressed with a public interest, it could be compelled to provide such supply, on equal terms and at reasonable rates. Wagner case, *supra*. Year by year conditions and prices with respect to almost everything relating to human wants are changing, and readjustments are permitted to meet them.

Hence the rule of the common law with respect to all business impressed with a public interest. This rule applied to appellee before the act of 1891, and thereafter sustained that act. *Munn v. The People*, 69 Ill. 80. This construction, we believe, is in accord with the intent of the legislature. The principle of the *Milliken*, and other cases, harmonizes, and renders operative the two statutes, preserves private and public rights, and subserves the ends of justice. The contract, therefore, expressed in Sec. 9 of the ordinance, in so far as it fixes a price for the entire period of twenty-one years, is not binding on the city for that

period, but is binding until changed, as provided in the act of 1891, or determined to be unreasonable, as therein provided. There is no proof in this record that the price was unreasonable prior to that act, or that any attempt thereafter was made to change the rate under that act. We therefore hold: 1. That the city had no right to refuse to take the supply of water, provided by the contract. 2. That the price therein fixed must be considered reasonable, until otherwise determined as herein indicated. The judgment will be affirmed.

The German Insurance Company, of Freeport, v. E. W. Johnson.

1. **INSURANCE—Limitations of Suits Brought in Policies—Waiver.**—If an insurance company, in case of a loss by fire, holds out reasonable hopes to the insured that the loss will be adjusted, and by so doing deters the bringing of a suit for the recovery of the same until the limitation of the time fixed in the policy for bringing such suit has expired, the company will not be allowed to assert such limitation as a defense to the suit.

2. **LIMITATIONS—In Insurance Policies—Time Consumed in Negotiation for Settlement, etc.**—If a part of the time allowed under the conditions of an insurance policy for the bringing of suit upon a loss is consumed on negotiations touching a settlement, the time so occupied should be added to the period specified therein.

3. **PRACTICE IN APPELLATE COURT—Abstracting Instructions.**—The Appellate Court will not consider exceptions to the giving of instructions when none of the instructions given are properly abstracted.

4. **ERROR—Must be Made to Appear.**—Error must be made to appear; it will not be presumed.

Memorandum.—Suit for insurance. In the Circuit Court of Johnson County; the Hon. OLIVER A. HARKER, Judge, presiding. Declaration on the policy; pleas, general issue and limitations contained in policy; replication (see opinion); trial by jury; verdict and judgment for plaintiff; defendant appeals. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

WHITNEL & GILLESPIE, attorneys for appellant.

APPELLEE'S BRIEF, SPANN & SHERIDAN, ATTORNEYS.

As to the validity of the condition in the policy limiting the time for bringing the suit the authorities are conflicting. Many respectable authorities, it is conceded, hold that a condition of this character is void as against public policy. It does not affect the contract, but the remedy; a condition subsequent; for the payment of money after the liability is fixed by which the payment is barred, is a singular condition, and surely one which must necessarily result in great hardship. It is nothing less than an act of limitation of six months. A statute of limitation is founded upon public policy. A contract is void if made against the policy of the law. Not only this, but this limitation fixes a different time from the statute, and is in conflict with it. It seems to us that the weight of American authority does not support appellant's position, and in support of this statement we cite *Mayor of N. Y. v. Hamilton Ins. Co.*, 39 N. Y. 46; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Stein v. Niagara Fire Ins. Co.*, 61 How. Pr. (N. Y.) 144; *Barnum v. Merchants Ins. Co.*, 97 N. Y. 188; *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568; *Vette v. Clinton Fire Ins. Co.*, 30 Fed. Rep. 668; *Foreign v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352.

While such a provision in the policy was binding, it would be waived, if the company deterred the assured from bringing suit by holding out reasonable hopes of an adjustment. *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Derrick v. The Lamar Ins. Co.*, 74 Ill. 405; *F. and M. Fire Ins. Co. v. Chestnut et al.*, 50 Ill. 116.

From the case of *The Andes Ins. Co. v. Fish*, 71 Ill. 620; *Riply v. Aetna Ins. Co.*, 30 N. Y. 174; *Ins. Co. v. LaCroix*, 45 Tex. 158.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This was an action brought by appellee against appellant

on a fire insurance policy. Appellant pleaded the general issue, and another plea to the effect that the suit was not brought within six months from the time of the loss, as was required by the terms of the policy. A special replication was filed to the latter plea in and by which it was alleged, that, according to the terms of the policy, any loss should be due and payable sixty days after the receipt of proper and satisfactory proof thereof by the company at Freeport, Illinois. It was further averred in this replication that appellee sought to make and deliver such proof within the required time, but that by reason of the long and vexatious delays of appellant in making known its objections to the proof, and because of the many captious and unreasonable demands made by appellant for correction of the proof of loss, appellee was unable to furnish appellant satisfactory proof of loss, and to get the same approved by appellant "in such time, that sixty days would elapse from the time of the last submission of the proof of loss before the expiration of six months after said loss was sustained." Appellant affirms that this replication was traversed, though no rejoinder thereto appears in the record, and that the truth or falsity of this replication was the vital question on the trial of the cause.

The record shows that the fire occurred on January 1, 1890, and that proof of loss was forwarded to appellant at Freeport on four different dates.

The first proof of loss was forwarded about the 20th day of January, or within a very short time thereafter. There is no evidence showing when the papers were received by the company, but the evidence does show that, on the 15th day of February, they were put into the hands of Joseph Weiman, special adjuster for the company. Here was a delay of nearly three weeks. Weiman returned the papers on the day he received them, to appellee, together with a letter requiring certain amendments to be made, among them the signing of the statement by two disinterested neighbors and by the magistrate living nearest the place where the loss had occurred, who should certify their belief that the state-

ment was true, and that the assured had, without fraud, sustained the loss as set forth in the proof.

Within a few days after receiving this letter, appellee made certain of the amendments to the proof required, manifestly endeavoring to conform to the demands of the company, except as to the certificates of two disinterested neighbors mentioned in Weiman's letter. The papers, as amended, were forwarded to appellant at Freeport, and received by the company on the 3d, or 4th day of March, and thereupon forwarded to N. H. Sikkema, general State adjuster. Sikkema received the papers on the 6th or 7th day of March, and on the latter day sent them to Weiman. This gentleman swears that he did not receive the papers until the 2d day of April, nearly four weeks thereafter. According to Sikkema's testimony, the papers were in his hands on the 30th day of March, and were forwarded by him on that day to Weiman. Where were these documents for the three weeks intervening between the 7th and the 30th days of March, on both of which days they were in Sikkema's hands? There are some vague hints in the testimony to the effect that they were miscarried or missent, in which case either Sikkema or the government is to blame. However that may be, Weiman returned the papers to appellee on the 3d day of April, with a letter in which a single objection was stated, that is to say, that the statement was not signed by the nearest justice of the peace as was required by the letter of the 15th of February. It seems that the statement was signed by Wise, and that the controversy was whether Wise or Chambers was the nearest justice of the peace to the burned building.

The evidence shows that Chambers was the nearest, as the bird flies, but that, by the public highway, one was as near as the other. Appellee caused the papers to be amended, however, so as to comply with this requirement of the company, and forwarded them so that they reached Weiman, through the company and Sikkema, on the 18th day of April.

Let it be noticed that the fire occurred on the 1st day of

January, and that the six months within which suit was required to be brought, would expire on the 1st day of July. Also that suit could not be brought, according to the averment of the replication, until the expiration of sixty days after proper and satisfactory proof was made. This being true, proper and satisfactory proof should have been in appellant's hands by the 2d day of May. One day's delay after this date would carry the time for bringing the suit beyond the 1st day of July, by adding the sixty days allowed for payment, and the limitation clause of the policy could be invoked as a bar to the maintenance of the action.

Up to the 29th day of April, appellant had led appellee to believe that the amount of the loss would be paid within a reasonable time after the completion of the proof. In the letter of the 3d day of April, but one objection was pointed out, which was equivalent to a declaration that when this amendment should be made the proof would be accepted and the policy paid. On the 29th day of April, however, Weiman, having held the completed proof for eleven days, returned the papers to appellee with the objection that they did not contain a certificate of two disinterested neighbors that the statement was true, and that the assured had, without fraud, sustained the loss as set forth in the proof. Why this delay of eleven days? Why the delay of three weeks on the receipt of the first proof, and of more than three weeks on the receipt of the second, especially when the limitation of time in the policy was very stringent, and the utmost expedition and good faith were required, in order that appellee might have a fair opportunity to assert his rights?

No satisfactory explanation of any of these delays is given by any agent or employe of the company. When Weiman returned the proof on the 29th day of April, did he not know that the policy in question insured no live stock, and that no claim for the loss of live stock had been made? Did he not also know that the certificate of two disinterested neighbors was required only in case of the loss of live stock? In his testimony he does not assert his igno-

rance of any of these matters. He must have been fully advised on all these points. Why, then, did he return the papers with this captious and unreasonable demand if not in the expectation that appellee would undertake to amend them in the specified particulars, and be unable to put the proof into the hands of the company at Freeport before the 3d day of May, and thus furnish appellant an opportunity for setting up the limitation clause of the policy as a defense?

But, it is said, this is fraud; this is a "false issue"; the replication does not aver fraud, and therefore fraud, if established, is no answer to appellant's plea. The replication avers that appellee sought to make and deliver satisfactory proof within the required time, and this averment is sustained by the evidence. The replication also avers that by reason of the long and vexatious delays of appellant in making known its objections to the proof, and because of the many captious and unreasonable demands made by appellant for correction of the proof of loss, appellee was unable to furnish appellant *satisfactory proof of loss and to get the same approved by appellant in time*, and this averment is sustained by the evidence. The proof of loss was not at any time accepted as satisfactory, or approved, by appellant. The papers, after they left the hands of Weiman on the 29th day of April, appear in the hands of appellee's attorney on the 3d day of May. The attorney had the right to assume that by calling the company's attention to the fact that the amendment demanded was not required by the policy, the company would approve the proof furnished and make payment without suit within a reasonable time. At any rate it was now too late to sue, unless the limitation clause of the policy had been waived by appellant's conduct. On the 3d day of May the papers were returned to the company without amendment, and at the same time a letter was forwarded, stating the reason why the certificate demanded was not furnished, and asking the company to pay or refuse to pay the claim. This letter was never answered. Sikkema admits having the papers on the 16th day of May, and swears that he sent them to Weiman on the same day. Here let the matter rest.

But appellant insists that the fact that appellee attempted to bring this suit on the 15th day of May is an admission by him that the limitation clause had not been waived, but the waiver, if any, applied to that clause of the policy which allowed sixty days for payment after the receipt of proper proof of loss; appellant contends that no suit was in fact commenced till the 2d day of September. Appellee's counsel attempted to file a *præcipe* for a summons on the 15th day of May, but, by mistake, filed a *præcipe* for a subpoena. At the same time he ordered the clerk not to issue the summons, till he, the attorney, should call for it. Appellant strenuously contends that this was not the commencement of a suit. Conceding the correctness of this position, we are unable to see on what principle appellee is estopped by this inefficacious act from insisting now on the waiver of the limitation clause. We hold that the replication to the plea of limitation under the policy, having been sustained by the proof, the defense set up by that plea is out of the case.

In *Allemania Fire Insurance Company v. Peck et al.*, 133 Ill. 220, the defendant pleaded in bar the failure of the plaintiff to sue within six months. The plaintiff replied that the defendant held out reasonable hopes of an adjustment, and thereby deterred the plaintiff from commencing his suit, and that the plaintiff honestly confided in the promises and pretenses of the defendant. It was also alleged that the plaintiff delayed bringing the suit at the defendant's request. It was held that the replication was good without the last allegation, and that this allegation need not be proved. The decision of the Supreme Court is upon the theory that, in such case, the defendant is estopped from setting up the limitation clause as a defense. There is no reason why this rule should not be applied to such a state of facts as is disclosed by the record before us. Nor is the court called upon to create a new limitation clause by adding the time lost to the six months provided for in the policy. The replication having been proved, the plea ceases to be a defense, and there remains no question of limitation in the case. But even if such a course should be pursued,

under the suggestion of the court in *Allemania Fire Insurance Company v. Peck et al.*, 33 Ill. App. 548, only sixty-three days would be required here, this suit having been commenced on the 2d day of September, 1890, and the number of days being no more than the aggregate of the delays for which appellant should be held responsible.

It is said that the court erred in giving appellee's 1st and 3d instructions, and in refusing appellant's 1st, 2d, 3d and 4th instructions. The abstract states that instructions were given on the part of appellee and also on the part of appellant, covering altogether nine pages of the record, and yet not one of these instructions is set forth in full, or in substance, in the abstract. The four refused instructions appear in the abstract, but the instructions given may have covered fully the same ground. This court will not consider exceptions to the giving or refusing of instructions when none of the instructions given are abstracted. *Joliet Street Railway Co. v. Call*, 42 Ill. App. 41; *McGillis et al. v. Anderson*, 44 Ill. 601.

The fourth refused instruction propounded certain questions to the jury, but the record fails to show that any copy thereof was submitted to appellee's counsel before the commencement of the argument, and for aught that appears to the contrary, the instruction may have been refused for non-compliance with this requirement of the statute.

Error must be made to appear; it will not be presumed.

We see no material error in the record.

The judgment is affirmed.

H. Tompkins v. James Gerry.

1. AWARD—*What Is Not.*—When parties having mutual accounts, deliver their books to a third person and agree that he shall examine the respective accounts therein, ascertain what balance, if any, there appears to be due from one party to the other, and report the result of his examination to them, and that they should adopt such report as a correct statement of the amount due and to whom it was due, and settle

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on that basis, the report of such person of the amount due, etc., is not an award.

2. **AWARDS—*What Is.***—An award is the judgment or decision of arbitrators or referees on matters submitted to them to be decided, whereby a duty is imposed to be performed by one or more of the parties who have so submitted such matters to such arbitrator or referees.

3. **SETTLEMENT—*What Is Final.***—Where parties are unable to agree in their accounts and submit them to a third party for an examination and report thereon, his report, when made, has no legal force until accepted and adopted by the parties as correct; but when this is done, a final settlement of all accounts between them was effected, binding on both.

Memorandum.—Assumpsit. Account stated. Appeal from the Circuit Court of Wayne County; the Hon. CARROLL C. BOGGS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

BUNCH & BONHAM, attorneys for appellant.

CREIGHTON & KRAMER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellant brought this suit in assumpsit against appellee to recover the amount of an account claimed to be due and unpaid. The declaration contained the common counts only. We find the following facts to be fairly established by the evidence in the record: That Tompkins and Gerry had dealings together during a period of several years; Gerry did work for Tompkins, and the latter furnished supplies, goods and money to Gerry during said period. Each kept a book account of the items he claimed to be due from the other, and upon which no credits appear. After having made several ineffectual efforts to effect a final settlement, the parties delivered their books to one John Hargraves, and agreed he should examine their respective accounts therein, ascertain what balance, if any, there appeared to be due from one party to the other, and report the result of his examination to Tompkins and Gerry, who should adopt such

report as a correct statement of the amount due, and to whom it was due, and settle on that basis. In accordance with this agreement, Hargraves examined said accounts and reported to the parties, that he found, as the result of such examination, there was a balance of \$188.40, due from Tompkins to Gerry. The parties adopted this report and agreed to a settlement in accordance therewith, and Tompkins promised Gerry to pay him the amount so found due within a few days; failing to do so, Gerry brought suit against him to recover said amount before a justice of the peace, on May 11, 1891. Before that, however, Tompkins brought the present suit in the Circuit Court against Gerry and pleaded the pendency thereof in abatement in the justice's court, but the justice heard evidence on the merits and entered judgment against Tompkins for the amount of said balance. Tompkins appealed to the County Court, where he re-filed his said plea, to which a demurrer was sustained. He elected to abide by the plea, and declined to further plead. Judgment was entered against him for said balance for \$188.40 and costs, and Tompkins took an appeal to this court, where said judgment was affirmed and the opinion filed June 21, 1892.

In the case at bar the record shows that the parties appeared, a jury was waived, and this cause was submitted to the court for hearing and trial, and all special pleas were withdrawn by defendant, and on April 14th, it being one of the days of the March term, 1893, the cause was heard, the court found the issue for defendant and entered judgment for him, against the plaintiff, for the costs, and Tompkins took this appeal. The errors assigned are as follows: that the court admitted improper evidence on the part of appellee. That the court refused proper evidence on the part of appellant. That the court improperly refused to hold, as requested by appellant, to wit: The 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th and 13th instructions. That the verdict is contrary to the evidence. That the court erred in admitting evidence by appellee, after filing general issue and plea of set-off of an open account, that the judgment had and pleaded was

based on an award of all accounts. The court erred in not sustaining appellant's motion to strike out all evidence tending to prove that the judgment, set up as a set-off against appellant's demand, was a judgment upon an award. That the court erred after having received improper evidence on part of appellee, under the special plea of set-off and verdict, to permit the withdrawal of said special pleas, and render a judgment as on an award. That the court erred in not rendering judgment for appellant. The first error is not well assigned. We do not find any error in the admission of evidence, and all objections on behalf of appellant made to the admission of any evidence were general objections, without any special reason being assigned in support thereof.

Appellant has not called our attention to any instance where the court refused proper evidence offered on his behalf, hence the second error is not well assigned. The third error is not well assigned. The propositions mentioned were properly refused to be held as the law applicable to the facts in the case. The fourth error will be discussed hereafter in this opinion. The fifth error is not well assigned. The transcript of the record shows that before the trial all special pleas were withdrawn, and the plea of general issue and joinder only remained. The cause was tried upon the issue thus joined, and the evidence objected to was properly admitted to show a settlement between Tompkins and Gerry, and a recovery by the latter of the balance found due him on such settlement. We find no such motion or ruling in the record as is mentioned in the sixth assignment of error; and this error is not well assigned. The seventh error assigned is based on a misapprehension of the facts. The special pleas were withdrawn before evidence was heard, nor was the judgment rendered "as on an award." The eighth error assigned is not well assigned, if the finding of the court is warranted by the evidence, and the correctness of that finding is denied by the fourth assignment of error, which we will now consider. And at the outset we desire to say, the report made to the parties by Hargraves of the balance he found to be due, was not an award, nor is it essen-

tial to the affirmance of this judgment that it should be held to be such.

An award is the judgment or decision of arbitrators or referees on matters submitted to them to be decided, whereby a duty is imposed, to be performed by one or more of the parties who have so submitted such matters to such arbitrators or referees. In this case, both parties desired a final settlement of their accounts, but were unable to effect it by themselves; therefore they sought and obtained the aid of Hargraves in adjusting said accounts for the purpose of a settlement. He was furnished by the parties with their books containing all the accounts then claimed by each, of items due from the other, and found the amount of Gerry's account against Tompkins to be \$408.35, and that the amount of Tompkins account against Gerry was \$219.95. He therefore reported the balance due Gerry from Tompkins to be \$188.40, which was accepted and adopted by the parties as correct, and Tompkins promised to pay Gerry said balance, but failed to do so. It is true this report, when made, was simply an expression of opinion by Hargraves to the parties, that a fair and correct settlement of all accounts between them would be the allowance of a balance of \$188.40 to Gerry, as the full amount due him from Tompkins. The report had no legal force until it was accepted and adopted by the parties as correct, but when this was done, a final settlement of all accounts between them was effected, binding on both, whereby it was agreed said balance was due Gerry and which Tompkins was legally bound to pay him. *Strage v. Gorich*, 107 Ill. 361.

Notwithstanding this final settlement, and the fact that Tompkins had been allowed credit for the amount of the account he claimed to be due him from Gerry, as itemized in his books when he delivered them to Hargraves, and the further fact that he promised to pay the amount of said balance to Gerry, Tompkins afterward brought the present suit, to recover the amount of his said book accounts, and some small items he claims were not on his books when he delivered them to Hargraves, but which, if they were due

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him at all, did not accrue after that time. Upon the facts the trial court could properly find that a final settlement between the parties, binding on both, had been made. That in that settlement Tompkins had received credit for, and had been allowed the full amount he claimed was then due him, and had no cause of action. The necessary legal result of such finding was a judgment against Tompkins for costs, which was properly entered, and is affirmed.

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J. W. Browning v. James M. Jones.

1. **CRIMINAL CONVERSATION—*Upon What the Case is Based.***—A case for criminal conversation is based on an injury to the person of the plaintiff; hence, the action was often brought in the form of trespass, for the wife could not consent to criminal intercourse, which, in its very nature, is exclusive in the husband.

2. **CRIMINAL CONVERSATION—*The Modern Practice.***—The usual practice now is to bring the action in case, as being more in consonance with the consequentiality of the damages to be recovered.

3. **DAMAGES—*In Criminal Conversation Case.***—In criminal conversation cases the damages arise out of the breach or destruction of the marriage contract, under and by virtue of which the husband had acquired a right and interest in what is termed in law consortium, that is, the wife's co-operation and aid in every conjugal relation.

4. **DAMAGES—*Aggravation of, in Criminal Conversation Cases.***—In criminal conversation cases, the degradation, the mental anguish and distress, the loss of affection and service, if any ensues, are considered in aggravation of damages.

5. **CRIMINAL CONVERSATION—*Recrimination Not a Defense.***—Conjugal rights exist, though the husband, by his fault, is living apart from his wife and leading a dissolute life. Recrimination is not a defense to the action for criminal conversation as in a proceeding for divorce.

6. **DAMAGES—*Mitigation in Criminal Conversation Cases.***—In Criminal conversation cases desertion, adulteries at any time after marriage and before trial on the part of the husband, together with other gross immoralities and avowals of profligate principles, and loss of affection on the part of the wife, are competent in mitigation of damages.

7. **CRIMINAL CONVERSATION—*Elements of Damages.***—In cases of this character, an actual marriage must be proven. Criminal conversation is an invasion of the rights acquired thereby. Whatever damages arise therefrom, as loss of consortium, with all that term implies, aggravated by degradation, distress and mental anguish, if any ensues—like humil

iation and disgrace, pain and anguish of mind consequent in such injury, should be regarded as natural and proximate damages.

8. **DAMAGES—*Proximate in Criminal Conversation Cases.***—The fact that the injuries are of such a nature as not to be susceptible of exact admeasurement in money value, does not make them any the less proximate.

9. **DAMAGES—*Vindictive.***—In criminal conversation cases, in addition to actual damages, the criminal conversation being wanton and criminal in its nature and the action being vindictive, the jury are permitted to give damages for the double purpose of setting an example and of punishing the wrongdoer.

10. **DAMAGES—*Vindictive, in Criminal Conversation Cases—Competent Evidence.***—For the purpose of proving a case for vindictive damages, proof of the condition in life and circumstances as well of the "husband," as of the party committing the injury, is proper, and should be considered by them in estimating the damages.

11. **CRIMINAL CONVERSATION—*Not Different from other Actions in Tort.***—The fact that this action is termed "vindictive" does not distinguish it from other like actions, such as libels, defamation, assault and battery, false imprisonment, etc., which are likewise termed "vindictive." The terms "vindictive," "punitive" and "exemplary," are indifferently employed in describing damages which are beyond compensation.

12. **DAMAGES—*When Exemplary Damages Will Be Given.***—Where either of the elements of fraud, malice or oppression, mingle in the controversy, the law permits the jury to give what it terms punitive, vindictive, or exemplary damages.

13. **INSTRUCTIONS—*Vindictive Damages.***—In actions where vindictive damages may be allowed, it is error for the court to instruct the jury that the plaintiff is "entitled" to or that they "ought" to give him vindictive damages on the ground that the court thereby invades the province of the jury.

14. **EXEMPLARY DAMAGES—*Province of the Jury.***—Exemplary damages are given as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression. The province of the jury, in determining the amount of these damages, would be too much invaded if they were instructed it was their duty to allow such damages, instead of being told that they might allow them or were at liberty to allow them.

15. **INSTRUCTIONS—*Exemplary Damages.***—An instruction on the question of exemplary damages, which is not only advisory but coercive to make such damages large on the grounds of public policy and for the protection of the home, etc., is erroneous.

16. **CHARACTER—*Of Wife in Action for Criminal Conversation.***—In an action by the husband for criminal conversation with his wife, where the character of the wife for chastity has been attacked by evidence of acts of adultery, it is proper to admit proof in rebuttal, to show her general reputation for chastity.

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17. EVIDENCE—*Declaration of Witnesses—Corroboration of Their Evidence.*—Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited. But it is otherwise where there is some independent evidence tending to show that the witness' account of the transaction was a fabrication of recent date. In such a case it may be shown that he gave a similar account before its effect and operation could be seen.

Memorandum.—Action for criminal conversation. Appeal from the Circuit Court of Johnson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; defendant appeals. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

Plaintiff's eleventh instruction assigned for error:

11. If you believe by a preponderance of the evidence that the defendant, for the purpose of having or continuing sexual intercourse with the plaintiff's wife, eloped with her and went to Oklahoma, where he intended to marry her and where she died, by means of which the plaintiff is permanently deprived of her society, without the consent of her husband, then and in such case you should find for the plaintiff and assess the damages at such sum as you are warranted in assessing under the evidence.

APPELLANT'S BRIEF, W. W. DUNCAN AND WHITNEL & GILLESPIE, ATTORNEYS.

The ground of the action for criminal conversation, is the infliction upon the husband of some one or more of the following injuries: 1. Dishonor of the marriage bed. 2. Loss of the wife's affections. 3. Loss of the comfort of the wife's society. 4. Total loss of the wife's services where she absconds from her husband, and probable diminished value of services where she does not. 5. The mortification and sense of shame that usually accompany the wrong. Cooley on Torts, 262.

If such injury is inflicted under circumstances of peculiar hardship and oppression, exemplary or punitive damages may be allowed by the jury in favor of the plaintiff. 7 Amer. and Eng. En. of L. 450.

It is necessary that the plaintiff should fix by the evidence a basis from which the jury can determine the amount of damages. 1 Sutherland on Damages, 740; Rea v. Tucker, 51 Ill. 110; Yundt v. Hartrunft, 41 Ill. 16; Peters v. Lake, 66 Ill. 206.

The instructions given for plaintiff ignore this principle and ask the jury to enforce public morals and preserve the sanctity of the marriage relation by assessing such sum of damages against the defendant as the jury deem requisite to that end, provided only that the fact of sexual intercourse shall be found.

It is the province of the jury to pass upon the question as to whether exemplary damages should be allowed, and if allowed, the amount of such damages; and the only question for the court is, whether there is sufficient evidence of fraud, malice, deliberate violence or oppression to warrant the submission of the question of punitive or exemplary damages to the jury. 3 Sutherland on Damages, 469, Ed. 1883, and Vol. 1, page 742; Tetzner v. Naughton, 12 Ill. App. 148; Wabash, St. L. & P. Ry. v. Rector, 104 Ill. 296; Harrison v. Ely, 120 Ill. 83; Kennedy Bros. v. Sullivan, 34 Ill. App. 57; McNay v. Stratton, 9 Brad. 216; Schimmelfenig v. Donovan, 13 Brad. 47.

It is not the form of the action that determines the plaintiff's right to exemplary damages, but defendant's moral culpability, as shown by the evidence. The amount to be awarded should depend upon the conduct and relations of all the parties and the pecuniary circumstances of the defendant. 1 Sutherland on Damages, Vol. 740; Rea v. Tucker, 51 Ill. 110; Ball v. Bruce, 21 Ill. 161; Peters v. Lake, 66 Ill. 206; Yundt v. Hartrunft, 41 Ill. 16.

In mitigation of damages it was proper for defendant to introduce evidence establishing: 1. Previous carnal connection of plaintiff's wife with other men. 2. Her deportment toward defendant tending to prove that she made the first advances. 3. The plaintiff's criminal connection with other women. 4. The bad terms on which plaintiff previously lived with his wife. 5. His improper

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treatment of her, and any other facts tending to show either the little intrinsic value of her society, or the light estimation in which plaintiff held it. 6. The declaration of the wife prior to alleged seduction complaining of plaintiff's ill treatment. 2 Greenleaf on Evidence, Sec. 56; Cooley on Torts, 2d Ed., pages 262 to 264 inclusive; Rea v. Tucker, 51 Ill. 110; 3 Sutherland on Damages, 744-45.

The law is that no element of damages can be based on the death of the wife, and the fact of her death can not be taken into account either as ground of the action or as aggravation of damages, and the husband's recovery must be limited to the loss suffered intermediate the injury and death. Cooley on Torts, 2d Ed. *page 226, p. 265; Hyatt v. Adams, 16 Mich. 180; Pack v. New York, 3 N. Y. 489.

When a witness is charged with testifying under the influence of some motive prompting him to make a false statement, or that his testimony is a fabrication of recent date, it may be shown in corroboration of him that he gave a similar account before such motive existed, or before the effect of such could be foreseen; so, also, when his testimony is discredited on cross-examination or by the testimony of others. Gates v. The People, 14 Ill. 433; Lockwood v. Betts, 8 Conn. 130; Robb v. Hackney, 23 Wend. 50; Stolp v. Blair, 68 Ill. 541; Herrick v. Smith, 13 Hun, 446; Hester v. Conn, 85 Pa. St. 139; Commonwealth v. Jenkins, 10 Gray, 485; People v. Doyell, 48 Cal. 85; State v. Hendricks, 32 Kan. 559; State v. Dennin, 32 Vt. 158; 1 Starkey on Evidence, 187; Phillips on Evidence, 808; 1 Greenleaf on Evidence, Sec. 469; Stephen's Dig. of Law of Evidence (Chase's Ed.), 235, note 3.

APPELLEE'S BRIEF, SPANN & SHERIDAN, ATTORNEYS.

The damages allowed in suits for criminal conversation are penal rather than compensatory, etc. * * * They are often exemplary and punitive. 9 Amer. & Eng. Ency. of Law, 835.

In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double

purpose of setting an example and of punishing the wrongdoer. *Grable v. Musgrave*, 3 Scam. 373.

"If the party in such case is confined to the actual pecuniary damages sustained, it would most often be no compensation at all above nominal damages, and no salutary effect would be produced on the wrongdoer by such a verdict. But we apprehend that if the act is wrongfully and wantonly committed, the party may recover in addition to the actual damages, something for the indignity, vexation and disgrace to which the party has been subjected." *Chicago and Northwestern Railway Company v. Anna Williams*, 55 Ill. p. 185, from opinion at page 190; 1 Sedgwick on Damages, Seventh Ed., 53, and Vol. 2, p. 253; 1 Sutherland on Damages, Chap. 9; *Reeder v. Purdy*, 48 Ill. 262; *Yundt v. Hartrunft*, 41 Ill. 10; *Onsly v. Hardin*, 23 Ill. p. 353.

The decided weight of authority is that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited. 2 Phillips, Ev., 5th Ed., 973; 1 Starkie, Ev., 147; *Robb v. Hackley*, 23 Wend. 50; *Conrad v. Griffey*, 11 How. 480; *Gibbs v. Tinsley*, 13 Vt. 208; *Etticott v. Pearl*, 10 Pet. 412.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee brought this suit against appellant for criminal conversation, which resulted in his wife's elopement with appellant. The evidence places both parties to this suit in an unenviable light before this court. That appellant was guilty of the offense charged is clearly proven, and that appellee had been guilty of almost open lewdness with the vile strumpet, Nan Bain, who roamed the woods in his neighborhood dressed in men's clothing, the common subject for the gratification of the lust of the lowest, which disgusted and tended to alienate the affections of his wife, is established. He was also guilty of visiting lewd houses. Notwithstanding appellee's conduct, appellant had no moral or other right to debauch his wife. It is evident, however,

that appellee's conduct had weakened, if not destroyed, his wife's love for him, made her less appreciative of the sacredness of the marriage relation, and more susceptible to the wiles of appellant, where passions were but slightly restrained by any moral sense. He deserted his wife and family to elope with appellee's wife, and live with her in an open state of adultery. The evidence shows that he was also guilty of visiting houses of prostitution. The jury brought in a verdict of \$2,000 against appellant, which was sustained by the court, and judgment entered thereon, which we feel constrained to set aside, on account, principally, of misdirection in the instructions on behalf of appellee. The instructions proceed on the theory that the suit is wholly in the nature of a public prosecution, for the punishment of the defendant, and to deter others from committing like offenses, by awarding heavy damages.

They are as follows: The italics are ours.

12. Where a person is proven by a preponderance of evidence to have had sexual intercourse with the wife of another, the injured party is entitled to damages *which are given by way of punishment*, whether the husband prove any actual damages or not. Given.

13. You are further instructed that the husband has the exclusive right of sexual intercourse with his wife, and whoever violates this exclusive right is liable in damages, *which are given by way of punishment*, and if the husband loses the service and society of his wife thereby, such additional compensatory damages as he may be entitled to under the evidence should be awarded. Given.

19. On the question of recovery in this form of action the court instructs you that the amount of the recovery or damages *are penal rather than compensatory*, that is, that damages are assessed by way of punishment for the violation of the husband's marital rights. Given.

The jury are instructed that *damages* in this form of action are *given on grounds of public policy* for the protection of the home and the marital relation, and in making such assessment if you believe from the preponderance of the evidence

that the defendant is guilty as charged, you *should* assess such damages by way of punishment as may be requisite to the enforcement of the law, and the preservation of the sanctity of the marriage relation, although there may be no proof of actual damages. Given.

A crim. con. case is based on an injury to the person of the plaintiff; hence the action was often brought in the form of trespass; for the wife could not consent to criminal intercourse, which in its very nature is exclusive and sacred in the husband. Hilliard on Torts, Vol. 2, 506; 1 Chit. Pl. 164.

The usual practice now is to bring the action in case, as being more in consonance with the consequentiality of the damages allowed to be recovered. Those damages arise out of the breach or destruction of the marriage contract, under and by virtue of which the husband had acquired a right and interest in, what is termed in law, consortium, that is, the wife's co-operation and aid in every conjugal relation (*Bigaonette v. Paulet*, 134 Mass. 123), which is the converse of a dishonored bed, the destruction of domestic comfort, of suspicion cast upon the legitimacy of offspring, of mortification and shame to the husband usually accompanying the adultery of his wife. *Yundt v. Hartrunft*, 41 Ill. 17.

The degradation, the mental anguish and distress, the loss of affection and service if any ensues, are considered in aggravation of damages. *Paulet case, supra*.

Conjugal rights, however, exist, though the husband by his fault is living apart from his wife, and leading a dissolute life. Recrimination is not a defense to this action as in a proceeding for divorce. Hilliard on Torts, Vol. 2, p. 508. But desertion, adulteries at any time after marriage and before trial on the part of the husband, together with other gross immoralities and avowals of profligate principles, and loss of affection on the part of the wife, are competent in mitigation of damages. Hilliard on Torts, Vol. 2, p. 687.

As is said in Amer. and Eng. Ency. of Law, Vol. 9, p. 835: "The jury considers the value of the wife (arising out of the relation created by the marriage contract)—and in that

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connection how much the plaintiff saw of her and cared for her, her easy fall, how far it was caused by the plaintiff's disregard of his marriage obligation." In cases of this character an actual marriage must be proven (*Hutchins v. Kimwell*, 31 Mich. 126), showing that the damages, whatever they may be, are founded upon the contract. Criminal conversation is an invasion of the rights acquired thereby. Hence whatever damages arise therefrom, as loss of consortium, with all that term implies, aggravated as they may be by degradation, distress and mental anguish, if any ensues, like humiliation and disgrace, (*C. & A. R. R. Co. v. Flagg*, 43 Ill. 368,) pain and anguish of mind consequent in such injury, (*I. & St. L. R. R. Co. v. Stable*, 62 Ill. 320,) in other personal injury cases, should be regarded as natural and proximate.

The fact that the injuries are of such a nature as not to be susceptible of exact admeasurement in money value does not make them any the less proximate. "The actual pecuniary damages in actions for defamation, as well as in the other actions for torts, can rarely be computed, and are never the sole rule of assessment." *Grable v. Margrave*, 3 Scam. 373. This feature of proximate damages has been treated at some length, so as to place the foundation of this action upon clearly recognizable legal grounds.

In addition to such damages, criminal conversation being wanton and criminal in its nature, and, therefore, the action being vindictive, "the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrongdoer. For these purposes, proof of the condition in life and circumstances, as well of the 'husband,' as of the party committing the injury, is highly proper, and should be considered by them in estimating the damages." *Margrave case, supra*; *Peters v. Lake*, 66 Ill. 506. The fact, however, that this action is termed "vindictive" does not, as seems to have been assumed in the instructions given on behalf of appellee, distinguish it from other like actions, such as libels, defamation, assault and battery, false imprisonment, etc., which are likewise termed "vindictive." The terms "vindictive," "punitive" and "exemplary" are indifferently employed in describing

damages beyond compensation. As is said in Sedgwick on the Measure of Damages, 6th Ed. p. 35, where either of the elements of fraud, malice, or oppression mingle in the controversy, the law permits the jury to give what it terms punitive, vindictive or exemplary damages. Consolidated Coal Co. v. Haeni, 146 Ill. 628.

The Supreme Court of this State has uniformly held that in such actions it is error for the court to instruct the jury that the plaintiff is "entitled" to or that they "ought" to give him vindictive damages, on the ground that the court thereby invades the province of the jury. Holmes v. Holmes, 64 Ill. 294; Collins v. Waters, 54 Ill. 484; Consolidated Coal Co. v. Haeni, 146 Ill. 628.

In the latter case it is said: "Exemplary damages are given as a punishment, where torts are committed with fraud, actual malice or deliberate violence or oppression. The province of the jury in determining the amount of the punitive damages would be too much invaded if they were instructed it was *their duty* to allow such damages, instead of being told that they might allow them or were at liberty to allow them."

The series of instructions given in this case on the question of punitive damages were not only coercive but advisory to make such damages large "on the grounds of public policy and for the protection of the home," etc.

The eighteenth instruction was bad for calling the jury's special attention to a particular part of the evidence. The eleventh instruction is conceded to be erroneous for making the death of the wife the basis of permanent loss to the plaintiff.

It is thought the circumstances tend to show that appellant wrote the letter introduced in evidence that was taken from the coffin, although it is somewhat singular no proof was offered of handwriting.

The proof on this point is not very satisfactory.

There is no reversible error in permitting the witnesses, Ella Mount and Belle Veach, to testify, after the appellee had closed his evidence; neither would it have been error, under the facts disclosed as to previous knowledge at least of one

of the witnesses' evidence, to have refused to permit them to testify.

There was no error in admitting proof in rebuttal on behalf of appellee to show the general reputation for chastity of his wife which had been specifically attacked by evidence of acts of adultery. 2 Greenleaf on Ev., Sec. 58, casts a doubt upon the competency of such proof, but 1 Wharton on Ev., Sec. 51, holds it is competent.

The wife being dead, the latter authority is more in accord with our view of what is right.

The relation of conversation by appellee between himself and wife, was principally confined to what was necessary to explain certain acts of his. Such conversation should be carefully and closely confined and not be permitted to extend so as to get her statements as independent evidence before the jury. The offer of evidence by appellant, to show that Seibman had made statements to other parties of his relation with Mrs. Jones, before he could be suspected of being improperly influenced, was properly excluded, for the reason that his evidence was only directly attacked by impeachment and not by independent proof; that of itself would indicate that his story was a recent fabrication. It is true many questions were asked him on cross-examination for the purpose of discrediting his testimony on that point, but though such cross-examination may have resulted in contradiction, or as tending to show recent fabrication, yet that, of itself, is not sufficient to admit evidence on former declaration not under oath. In the Blair case, 68 Ill. 543-4, it is said: "We find the decided weight of authority to be that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited."

Had there been some independent evidence tending to show that the witness' account of the transaction was a fabrication of recent date, then it might have been shown that he gave a similar account before its effect and operation could be seen. Ibid.

For reasons stated, we reverse and remand the cause.

George Stroup v Logan Chalcraft.

1. **TRESPASS TO REAL ESTATE—Remedy by Injunction.**—Where it appeared that a complainant, who was the real owner in fee of the land described in his bill, had fenced, inclosed, cleared up and cultivated a part of the land, and was in the lawful and exclusive possession, and there was not, nor ever had been a public highway over the same, that while he was in such possession, and soon after the land was so inclosed, the defendant, under the pretense that there was a public highway over said land, and that complainant had obstructed the same by fencing, "with force and violence pulled out the gate posts, and has repeatedly since that time, cut the wires of said fence, torn said gate posts, and passed over said land, and at a time when defendant was cutting down said fence and complainant remonstrated, defendant threatened to kill him, if he did not keep out of his way, and threatened to cut down said fence every time it should be repaired," and that if said defendant is allowed to continue his trespasses, complainant will not be able to cultivate said land, and endless litigation will result, *it was held* sufficient to entitle the complainant to an injunction.

2. **INJUNCTION—To Restrain Trespass—Irreparable Injury.**—Irreparable injury, authorizing the interference of a court of chancery by injunction, need not always be such injury as to be beyond the possibility of repair, or beyond possible compensation in damages, not necessarily great injury or great damage, but is that species of injury, great or small, which ought not to be submitted to on the one hand, or inflicted on the other, and is of constant and frequent recurrence, so that no fair or reasonable redress can be had therefor in a court of law.

3. **DEMURRER—Its Effect in Chancery.**—The office of a demurrer to a bill in chancery, is to deny in form and substance complainant's right to have his case considered in a court of equity, and to admit that all the allegations of the bill properly pleaded are true.

4. **INJUNCTION—Trespasses—Legal Rights Established.**—When a bill is filed to restrain continuing trespasses to real estate, the defendant can not insist that the complainant must first establish his right at law, after a demurrer has been overruled to the bill and a decree rendered thereon, because the demurrer admits the truth of the allegations of the bill, and establishes the complainant's rights as completely as could be done in a court of law.

Memorandum.—Bill for injunction. Error to the Circuit Court of Edwards County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

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STATEMENT OF THE CASE.

Logan Chalcraft filed his bill in chancery in the Circuit Court of Edwards County, alleging his ownership in fee of the northwest quarter of the northwest quarter of Sec. 19, in township 2 south, range 10 east, in Edwards county, Illinois; that more than one year before filing the bill, he inclosed the said land with a fence and cleared up and cultivated a part thereof the past season; that prior to that time said land was wood land, and there was an old by-road or two, over the same, but avers there was not, nor ever had been, any public highway over the same; that soon after he inclosed said land George Stroup, under the pretense there was a public highway over said land, and that complainant had obstructed the same by fencing his said land, by brutal force and violence hitched his oxen to the gate posts and pulled them up, and has repeatedly since that time cut the wires of complainant's fence and torn down his gate posts and passed over his said land; that on one occasion when said Stroup was cutting down said fence, complainant remonstrated with him and said Stroup threatened to kill him if he did not keep out of his way, and December 27, 1892, said Stroup again cut a whole panel out of said fence and passed over said land; that he threatens to cut said fence down every time it is repaired and complainant believes he will do so; that if said Stroup is allowed to continue cutting down complainant's fence an irreparable injury will result to him, and he will not be able to cultivate his said land and endless litigation will grow out of it; that already one prosecution has grown out of it, and others will follow; that his remedy at law is wholly inadequate. Therefore, to prevent an irreparable injury and endless litigation, prays for injunction restraining Stroup from cutting or tearing down complainant's fence and passing over his said described land. A temporary injunction was ordered as prayed for, and said Stroup was served and appeared in the Circuit Court and filed a general and special demurrer to the bill, setting up as special causes: "It is

not therein alleged that defendant is insolvent and complainant has a complete and adequate remedy at law." The demurrer was overruled, and defendant elected to stand and abide by it, and having been ruled to answer, refused so to do, and a decree *pro confesso* was thereupon entered, and a final decree was also entered, perpetually enjoining and restraining Stroup from cutting down complainant's fences, and from passing over his said land, and for costs against defendant. Defendant craved and was allowed an appeal to this court, but failed to perfect it, and sued out this writ of error. The errors assigned are, that the court erred in not sustaining demurrer, in overruling demurrer, in not dismissing bill "for want of sufficiency in statement therein."

BRIEF OF PLAINTIFF IN ERROR, MUNDY & ORGAN AND CREIGHTON & KRAMER, ATTORNEYS.

No chancery court will enjoin a trespass until a judgment at law is had as to whether or not a trespass has been committed, and settle at law which is right in the contention. Poyer v. Village of Des Plaines, 123 Ill. 111; Dunning v. City of Aurora, 40 Ill. 481; Oswald v. Wolf, 129 Ill. 200; Goodell v. Lassen, 69 Ill. 145.

To entitle a party to maintain a bill of peace or bill to prevent a multiplicity of suits at law, there must be a right claimed affecting many persons. If the right is disputed between two persons only, not for themselves and all others interested, but for themselves alone, the bill will not lie unless the complainant's right has been established at law. McCoy v. Chillicothe, 3 Ohio, 379; Oswald v. Wolf, 129 Ill. 200.

BRIEF OF DEFENDANT IN ERROR, J. M. CAMPBELL,
ATTORNEY.

Chancery has jurisdiction by injunction to restrain trespass that will result in irreparable injury. McIntyre v. Storey, 80 Ill. 127; Wangelin v. Gore, 50 Ill. 465-466; Owens v. Crossett, 105 Ill. 357; Poyer v. Village of Des Plaines, 123 Ill. 11; Mooney v. Cooledge, 30 Ark. 640.

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Irreparable injury is such an injury as may not be beyond possible compensation in damages, but yet is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. *Whale v. Reinbach*, 76 Ill. 326. A controversy over a road, wherein one party closes it, upon the ground that a road does not exist, and the other persists in tearing down the fence, upon the ground that a public road does exist, and expresses an intention to tear the fences down as often as they are put up, makes a case of irreparable injury to sustain injunction. *McIntyre v. Storey*, 80 Ill. 128; *Owens v. Crossett*, 105 Ill.

Chancery has jurisdiction by injunction to restrain a continuing trespass, or one threatened to be repeated, of grave character. *McIntyre v. Storey*, 80 Ill. 128; *Owen v. Crossett*, 105 Ill. 466; *Poyer v. Village Des Plaines*, 123 Ill. 117; *Shrimer v. Morris, etc., Co.*, 27 N. J. Eq. 364.

A court of chancery has jurisdiction by injunction to restrain a threatened trespass that has been repeated and is continued in order to prevent a multiplicity of suits. *Owen v. Crossett*, 105 Ill. 357; *Wangelin v. Gore*, 50 Ill. 465; *Poyer v. Village Des Plaines*, 123 Ill. 117; *Shafer v. Stull (Neb.)*, 48 N. W. Rep. 882; *Smithers v. Fitch (Cal.)*, 22 Pac. Rep. 935; *Tantlinger v. Sullivan (Iowa)*, 45 N. W. Rep. 765; *Switzer v. McCulloch*, 76 Va. 777; *Chapman v. Toy Long*, 4 Sawyer, 28; *Todd v. Osborne (Iowa)*, 44 N. W. Rep. 235; *Musselman v. Marquis*, 1 Bush. (Ky.), 463.

Where the trespass is a continued one and the remedy at law is only by successive suits wherein the action for damages would be inadequate to protect the rights of the person trespassed upon, a court of chancery has jurisdiction by injunction to restrain the trespass. *Shrimer v. Morris Canal, etc., Co.*, 27 N. J. Eq., 364.

If the rights of a party can only be enforced at law by long continued, strenuous and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, injunction will be entertained. *West Point Iron Co. v. Reymert*, 45 N. Y., 703; *Crane v. McCoy*, 1 Bond, 422; 3 *Wait's Actions and Defenses*, 684; *Clark v. Jeffersonville, etc.*, 44 Ind. 248.

Where numerous acts are being committed and their continuance threatened under a claim of right by one person on the land of another, which acts constitute trespass, and the injury resulting from each act is or would be trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, injunction will lie to restrain the trespass. *Lembeck v. Nye* (Ohio), 24 N. E. Rep. 686.

It is sufficient to show in a case of this character that the remedy at law is not as practical and efficient as that in equity. *Migel v. Nally*, 45 Mo. 560.

In the assertion of a public right of way the defendant repeatedly tore down fences on complainant's land. The court granted an injunction because the acts, if not restrained, might afford grounds for the claim of a public way. *Carpenter v. Sawyer*, 35 Barb. (N. Y.) 395; *Schultz v. Allison*, 35 Pa. 88; *Hilliard on Injunction*, 2d Ed., 320.

It is not necessary to aver insolvency. *McPipe v. West*, 71 Mo. 199; *Shriner v. Morris Co.*, 27 N. J. Eq. 364; *Clark v. Jeffersonville R. R. Co.*, 44 Ind. 248; *Cobb v. I. & St. L. R. R. Co.*, 68 Ill. 233.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

The three errors assigned are based upon one and the same ground, and one assignment of error, viz.: That the court erred in overruling the demurrer. This comprises substantially all that plaintiff in error relies on for reversal. The office of a demurrer to a bill in equity is to deny in form and substance complainant's right to have his case considered in a court of equity, and to admit that all the allegations of the bill properly pleaded are true. Plaintiff in error having demurred to the bill, and abided by his demurrer, and refused to plead to or answer said bill, the following facts are to be taken as admitted by him to be true: That prior to and at the time of filing said bill, Logan Chalcraft, the complainant, was the lawful owner in fee of the land described therein, had fenced and inclosed said land, had cleared up and cultivated part thereof, and was

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in the lawful, exclusive possession of said land, and there was not, nor ever had been, a public highway over the same. That while he was in the quiet and lawful possession of said land and soon after it was so inclosed, George Stroup, the defendant, under the pretense there was a public highway over said land, and that complainant had obstructed the same by fencing his land, with force and violence pulled out the gate posts, and has repeatedly since that time, cut the wires of said fence, torn down said gate posts, and passed over said land, and at a time when defendant was cutting down said fence and complainant remonstrated, defendant threatened to kill him, if he did not keep out of his way, and threatened to cut down said fence every time it should be repaired. That if Stroup is allowed to continue his trespasses complainant will not be able to cultivate his said land, and endless litigation will result. That already one prosecution has been commenced and others will follow. These admitted facts are, in our judgment, sufficient to entitle complainant to the injunction prayed for.

But plaintiff in error insists the bill is defective, because it is not therein alleged that the acts of defendant, complained of and threatened to be continued, have been, by the judgment of a law court, held to be trespasses, and until that is shown, equity will not interfere. That it is not alleged defendant is insolvent, and such allegation is essential. That it is not shown by the bill and does not appear, that complainant is without an adequate remedy at law. That a right is disputed between two persons only, and the bill will not lie unless complainant's right has been established at law. In support of these propositions, the following authorities are cited: *Poyer v. Village of Des Plaines*, 123 Ill. 111, where it was sought to restrain the prosecution of suits for violation of a village ordinance on the ground that said ordinance was illegal, and it was held the suits were *quasi* criminal in character, and the legality or illegality of the ordinance was purely a question of law, for law courts to decide, and the court, for very good and sufficient reasons, set forth in the opinion, but not applicable to the facts in this case,

held that the prosecution of said suits ought not to be enjoined. It is said in the opinion there is no allegation of insolvency, but such omission is not the reason for denying the relief, and what is there said to the effect that "if the right is disputed between two persons only, not for themselves and all others interested, but for themselves alone, the bill will not lie unless the complainant's right has been established at law," does not apply to the facts in this case. In *Dunning v. City of Aurora*, 40 Ill. 481, the subject-matter is an alleged nuisance, which is sought to be abated, and an injunction to restrain its further maintenance is prayed for. The court holds, if the thing is itself a nuisance, equity will interfere without waiting the result of a trial at law. But if it is not unavoidably and in itself noxious, but may prove to be so, equity will not interfere until the fact of its being a nuisance is established in an action at law.

Oswald v. Wolf, 129 Ill. 200, was a case in which obstructing a private way was asked to be enjoined, and it was held that to entitle complainant to the relief, his case must be clear and free from substantial doubts—a strong case, of pressing necessity. *Goodell v. Lassen*, 69 Ill. 145, was a case in which the landlord sought to enjoin his tenant, renting for one year, from putting up a pawnbroker's sign. Held, to be no injury to the reversion, and not irreparable in its character so as to require equitable interference. The cases of *Hamilton v. Stewart et al.*, 59 Ill. 330, and *Owens et al. v. Crossett*, 105 Ill. 354, cited as supporting the contention that the bill was defective in this case, because the insolvency of Stroup is not alleged, are neither of them applicable in this case, and counsel for plaintiff in error are also mistaken in assuming that "the only contention is, whether or not a public road crosses the land of appellee, and the right to fence it up." On the contrary, it is admitted by the demurrer that no public highway crosses said land, or ever did. And the right of defendant in error to fence the same is also admitted. The bill in this case is not to enjoin the maintenance of a nuisance, or the commission of a single trespass threatened. Nor is it a case in which any

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right or authority to commit the trespasses complained of is set up or asserted by the defendant, Stroup. Upon the admitted facts, a stronger case is seldom shown requiring the aid of a court of equity to prevent irreparable injury and a multiplicity of suits. These facts show that Stroup, without the shadow of a right, in open violation of the civil and criminal law, destroyed the property of complainant; committed repeated trespasses; forcibly and in defiance of law, intruded upon and disturbed the complainant in his peaceable and lawful possession of said land; threatened the life of complainant, when he attempted to prevent the committing of a trespass by defendant, and threatens to continue and repeat his unlawful acts. In view of these facts, it would be unjust and wrong to decide that equitable aid ought to be withheld and the complainant be compelled to prosecute repeated suits to recover damages for the threatened trespasses. Irreparable injury authorizing the interference of a court of chancery by injunction, need not always be such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but is that species of injury, great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and is of constant and frequent recurrence, so that no fair or reasonable redress can be had therefor in a court of law. *Wahle v. Reinbach*, 76 Ill. 326. The law may afford a remedy in a given case, but if, as in this case, it is not an adequate remedy, equity will interfere, and in one proceeding, by its decree grant full relief, and furnish a more complete and efficient remedy than the injured party could obtain by resort to vexatious and protracted litigation, and prosecuting a multiplicity of suits at great expense. And a bill for injunction will lie, when a proper case is made, whether there is but one wrongdoer to be restrained, or many. Nor was it necessary in this case, to entitle complainant to the relief prayed for, that the insolvency of Stroup should have been alleged. It is not because damages *would not have been paid*, if recovered at law, that the aid of equity is invoked, but upon the grounds

above stated, and held by us to be sufficient. Many cases supporting our decision could be cited, but we deem it sufficient to refer only to a few of those which appear in the printed brief of defendant in error. *Shriner v. Morris Land Co.*, 27 N. J. Eq. 364; *Cobb v. I. & St. L. R. R. Co.*, 68 Ill. 233; *McIntyre et al. v. Story*, 80 Ill. 137. In the last case, the bill sought to enjoin commissioners of highways from opening a public road through complainant's land. Defendants admitted by their answer, they had torn down and removed the fence of complainant, as charged in the bill, but alleged they were officers of the town, having charge of its public roads, and express their purpose to continue to remove any fence complainant may erect in or across what they claim to be a highway, and make the point that chancery has no jurisdiction, but complainant's remedy, if he has any, is at law. The court say this proposition can not be maintained; that if there is no highway at the point in controversy, which defendants may lawfully keep open for the use of the public. then the acts they admit they propose to do would constitute continuing trespasses, might cause irreparable mischief, perhaps lead to continuous strife in the assertion and maintenance of what the parties may deem their respective rights, and ultimately produce serious breaches of the peace and acts of violence; that the facts alleged constitute a clear ground for the intervention of equity, and no complete remedy can be had at law. In the case at bar, Stroup does not set up or assert any right or authority, official or otherwise, to commit the trespasses complained of, but admits by his demurrer he did the unlawful acts, and threatened to repeat them, and will do so unless restrained, and did and threatens so to do upon the false pretense that a public highway existed, where in fact it did not. The injunction was properly granted, and the decree is affirmed.

Village of Belknap v. James A. Miller.

1. CITIES AND VILLAGES—*Passage of Ordinances*.—The following entry on the record of a village board :

“ March 11th, 1887.

The board met pursuant to adjournment and proceeded to business by adopting ordinances from number one to number seventeen, inclusive. All members present.

JAMES R. EVERS, Clerk.”

Sufficiently shows the passage of ordinance No. 4.

2. CITIES AND VILLAGES—*Requisites of the Journal—Ayes and Nays*.—It is not necessary that the yeas and nays must appear on the village journal of a village, incorporated under the general incorporation act of 1872, in order to give validity to an ordinance purporting to have been passed and adopted by the authorities of such village.

3. CITIES AND VILLAGES—*Record of—The Ayes and Nays on the Passage of an Ordinance*.—The first clause of Sec. 12, Art. 3, Part I. Chap. 24, of the general act for the incorporation of cities and villages, which provides that, “The yeas and nays shall be taken upon the passage of all ordinances which shall be entered on the journal of its proceedings,” is directory.

4. CITIES AND VILLAGES—*Passage of Ordinances—Record*.—Sec. 14 of Art. 3, Part I, of Ch. 24, of the general act for the incorporation of cities and villages, which provides that the concurrence of a majority of all the members elected in the city council (or village board of trustees) shall be necessary to the passage of any such ordinance, is mandatory.

5. CITIES AND VILLAGES—*Sufficiency of Record Showing Passage of Ordinances*.—Where it appeared on the journal of the proceedings that all the members were present and that an ordinance was adopted, the word “adopted” necessarily signifies that a majority of the members of the village board voted for the passage of the ordinance.

6. CITIES AND VILLAGES—*Right to Amend Record*.—A village board has the right, on proper proof, to supply an omitted or correct an erroneous entry in the journal and make the record complete.

7. CITIES AND VILLAGES—*Right of the Clerk to Amend the Record*.—If the clerk who made the defective entry is still in office, he can, without an order from the board, amend the journal entry according to the truth, being liable for an abuse of the right.

8. AMENDMENTS—*Of Records—General Powers of Cities and Villages*.—To deny cities and villages the right to complete or correct the clerk’s journal entries according to the facts, might involve them, and the officials executing their ordinances, in serious trouble, without subserving any good purpose.

Memorandum.—Suit for a violation of village ordinance. Error to the Circuit Court of Jackson County; the Hon. ALONZO K. VICKERS,

Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

JAMES C. COURTNEY, attorney for plaintiff in error.

SPANN & SHERIDAN, attorneys for defendant in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This case was tried by the court below on the following stipulation of facts: "The only question in this case is as to the validity of the passage of the ordinance under which the defendant was fined by the village magistrate. It was admitted that defendant was guilty of violating No. 4, of the village ordinances. Ordinance No. 4 is in the words following, viz.: 'Whoever shall make or assist in making, or encourage another in making any improper noise, disorder or tumult, or who shall permit such noise or tumult to be made in or about his, her or their house or premises, or who shall at any time disturb the peace or quiet of any neighborhood, family or person by loud or boisterous whooping, screaming, cursing, challenging to fight, fighting or mock-fighting, using obscene language, or by creating false alarms, or by any other device or means whatever, shall be fined in any sum not exceeding one hundred dollars.' It is admitted that the only record of the passage of said ordinance appearing on the journal of the proceedings of the board of trustees of the village, is as follows:

'BELKNAP, ILL., March 2, 1887.

The village board met at the store of W. L. Currey on the above date, with the president in the chair, and proceeded to business by reading minutes of last meeting and approving of the same. Motion made and carried to draft ordinances for village seal. Motion made and carried to have the village ordinances printed and bound in book form, as many copies as could be bought for \$10 or \$12.

Motion made and carried to adjourn until March 11, 1887.

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The board met pursuant to adjournment and proceeded to business by adopting ordinances from number 1 to number seventeen (17) inclusive. All members present.

JAMES R. EVERS, Clerk.'

It is admitted that said ordinance No. 4, together with ordinance No. 1 to 17 inclusive, as stated in the journal, were printed in book form by the village and purported to be published by authority of the board of trustees, as required by statute, with the date of the passage as appearing in the journal.

It is also admitted that the village was duly incorporated under the general incorporation law of the State.

Now, if the court shall be of the opinion that ayes and nays should appear on the journal in order to give validity to the ordinance, then the defendant is to go acquit; otherwise the judgment of the village magistrate to be affirmed with cost.

It is understood that on February 22, 1892, defendant was fined \$8 and cost by the village magistrate of Belknap, from which the present appeal is prosecuted.

Dated this 7th day of April, 1893.

W. A. SPANN, attorney for defendant.

JAMES C. COURTNEY, for Village of Belknap."

The foregoing was all the evidence offered in this case both by the plaintiff and defendant.

The court thereupon rendered a judgment finding the defendant not guilty, and rendered judgment against plaintiff for costs. To the rendition of this judgment the plaintiff then and there objected and excepted.

The single legal question presented for our consideration under the stipulation is, whether the yeas and nays must appear on the village journal of a village incorporated under the general incorporation act of 1872, in order to give validity to an ordinance purporting to have been passed and adopted by the authorities of such village.

The first clause of Sec. 13, Art. 3, Part 1, Chap. 24, of the general act for the incorporation of cities and villages, provides: "The yeas and nays shall be taken upon the

passage of all ordinances * * * which shall be entered on the journal of its proceedings." This provision is immediately followed by, "and the concurrence of a majority of all the members elected in the city council (or village board of trustees) shall be necessary to the passage of any such ordinance."

In the case of *Barr v. Village of Auburn*, 89 Ill. at p. 362, it is held that the latter clause is the "mandatory portion of this section."

In that case the journal showed "the following ordinance (the one in question) was unanimously adopted." No yeas or nays were entered on the journal. It was held that the above section did not require they should be entered, as "it appeared on the face of the journal that the ordinance passed with the concurrence of a majority of the members elected of the body passing the same."

This decision has not been overruled. It is sustained by many authorities cited in note to Sec. 291, Vol. 1, p. 364, 4th Ed., *Dillon on Municipal Corporations*. On that construction and on the faith of its stability, doubtless the authorities of cities and villages of this State have relied for the last fifteen years. By the express terms of the stipulation the only legal question submitted was, whether the "ayes and nays should appear on the journal, in order to give validity to the ordinance." For aught we know there may have been a distinct purpose in so limiting the question for decision. While it appears to us, the record showing that all the members were present, that the word "adopted" necessarily signifies that a "majority" of the members of the village board voted for the passage of the ordinance, yet if this should not be the correct legal position and the word "majority" or "unanimously" should be entered in the journal, in addition to the word "adopted," according to what the actual fact may have been, the village board has the right on proper proof to supply an omitted or correct an erroneous entry and thus make the record complete, if it is not so now. *Hutchinson v. Pratt*, 11 Vt. 402. If the same clerk who made the entry is still in office, he can,

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without an order of the board, amend the journal entry according to the truth, being liable for an abuse of the right. Dillon on Municipal Corporations, Vol. 1, Sec. 232. To deny corporations, such as cities and villages, the right to complete or correct the clerk's journal entries according to the facts, might involve them, and the officials executing their laws or ordinances, in most serious trouble, without subverting any good purpose. Dupage Co. v. Martin, 39 Ill. App. 298.

The conditions may be such that the appellant may desire to and can have the journal entry made to fully comply with the rule laid down in the Barr case, *supra*, and thus remove any doubt of the proper passage of the ordinance, should the question ever reach the Supreme Court.

The judgment is reversed and the cause remanded.

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81	83

James Eshelman v. The People of the State of Illinois
ex rel. Viola Gray.

1. **BASTARDY—Sufficiency of the Complaint.**—A complaint under the bastard act, made after delivery, should show that the relatrix was an unmarried woman at the time of the birth of her child. The recital of such fact, in that part of the complaint which precedes the words "who says," is not sufficient. (See memorandum.)

2. **BASTARDY—Allegation in Complaint that the Child was Born a Bastard.**—The allegation that the child was born a bastard, does not necessarily imply that the mother was unmarried at the time.

3. **BASTARDY—Right to Amend Complaint.**—There can be no controversy concerning the right to amend a complaint in bastardy proceedings.

4. **AMENDMENTS—Practice in Making.**—It is the better practice to make amendments on a separate piece of paper, and not by interlineation or erasure, and especially so when the paper to be amended is under oath.

5. **AMENDMENTS—Complaint in Bastardy.**—Where, in a bastardy proceeding, a motion for leave to amend was accompanied by the affidavit of the relatrix, affirming the truth of the facts to be added by way of amendment, it was held sufficient to make the amendment valid, even though the relatrix was not sworn to the affidavit as amended.

6. **LIMITATIONS—Commencement of Actions by Amendment of Plead-**

ings.—Where an amendment to a complaint does not introduce a new cause of action, the fact that the statute of limitations had run before the amendment, is not a defense.

Memorandum.—Bastardy proceedings. The complaint began with the following recital: "The complaint of Viola Gray, of Bridgeport, in the said county, an unmarried woman, made before H. W. Bunn, one of the justices of the peace in and for said county, under oath, who says that," etc. Appeal from the County Court of Lawrence County; the Hon. F. C. MESERVE, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

WM. ROBINSON and GEORGE HUFFMAN, attorneys for appellant.

J. E. McGAUGHEY, state's attorney, and GEE & BARNES, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

On September 24, 1890, Viola Gray appeared before a justice of the peace of Lawrence county and made a complaint charging appellant with being the father of her child. The complaint did not allege, except by way of recital at the beginning, that she was an unmarried woman at the time when her child was born, but did state that she had been delivered of a "male bastard child." The record does not show any motion to dismiss the proceeding in the justice's court on account of the insufficiency of the complaint, but does show that the state's attorney, by direction of the justice, amended the complaint by interlining therein the words, "that she is an unmarried woman."

Before the commencement of the trial in the County Court, appellant made a motion to dismiss the proceeding because of the alleged insufficiency of the complaint. Appellee made a cross-motion for leave to amend, and presented the affidavit of the relatrix in support thereof, in which she swore that before the making of the complaint she had told the justice of the peace that she was an unmarried woman,

and that, when she was sworn to the complaint, she supposed it contained a statement to that effect. This affidavit further stated that the child was born on October 5, 1888, and that the mother was then an unmarried woman. The court sustained the cross-motion and granted leave to amend the complaint, which was done by interlineation so as to show the date of the child's birth and to affirm that the relatrix was, and always had been, an unmarried woman. As soon as this amendment was made, appellant renewed his motion to dismiss, alleging again the insufficiency of the complaint and insisting that the complaint, as amended, should be sworn to by the relatrix, and also that the amendment, which was made on April 18, 1893, introduced new and material matter, barred, as a cause of action, by the statute of limitations. This motion was promptly overruled. Appellant then filed two pleas, one alleging that he was not guilty, and the other alleging that he was not guilty within two years prior to the amendment of the complaint. A demurrer was sustained to the second plea.

Upon the trial appellee proved the charge in the amended complaint; appellant offered no evidence, and the case was submitted to the jury without argument or instructions. A verdict of guilty was returned and judgment was rendered accordingly.

Appellant contends, in the first place, that the complaint was not amended, and in the second place, that the complaint, if amended, introduced a new cause of action, barred by the statute of limitations. There can be no doubt that a complaint under the bastardy act, made after delivery, should show that the relatrix was an unmarried woman at the time of the birth of her child, and that the recital of such fact in that part of the complaint which precedes the words "who says," is not sufficient. *Maynard v. The People*, 135 Ill. 416. And yet there is a marked distinction between the *Maynard* case and the case at bar. In the complaint in the former case, it is said that the child is likely to be born a bastard; in the complaint in the latter it is alleged that the child has been born a bastard. In one,

the allegation is of a probability; in the other of an actual fact. Inasmuch, however, as under some circumstances, a child born during wedlock may be a bastard (1 Blackstone's Com. *457), the allegation that the child was born a bastard does not necessarily imply that the mother was unmarried at the time. Passing from this question, let us inquire whether or not the complaint was sufficiently amended. In view of the decision in the Maynard case, there can be no controversy concerning the right to amend. The only question is, should the complaint have been sworn to after the amendment was made? It is the better practice to make amendments on a separate piece of paper, and not by interlineation or erasure, and especially so when the paper to be amended is under oath. Would it not be sufficient to present to the court an affidavit showing the truth of the facts to be added by way of amendment, and then to present the amendment on a separate piece of paper without any additional affidavit? If this could be done, would the amendment be inoperative and void merely because it was made by interlineation of the original? We think not.

We find some authority for our view of the law in *Kilmer v. The People*, 106 Ill. 529. In that case an affidavit which was intended to show a compliance with the law relative to the giving of notice to property owners in a special assessment proceeding, and which was required to be filed before judgment of confirmation, failed to show that the notice stated the term of court at which the assessment roll would be returned for confirmation. The assessment was confirmed. Afterward, on application for judgment, a motion was made for leave to amend, which was supported by the testimony of the commissioner who had made the affidavit and who was now sworn and examined as a witness on the subject. On appeal to the Supreme Court, it was held that leave to amend had been properly granted. The amendment had been made by filling out a blank in the original affidavit, and there is nothing to show that the commissioner who had made the original affidavit made oath to

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the affidavit as amended, otherwise than by his oral statement of the facts when examined as a witness in open court. The Supreme Court say: "The amendment was clearly in furtherance of justice; it simply made the affidavit speak the facts as they occurred and as was intended by the party making it."

In the case at bar the motion for leave to amend was accompanied by the affidavit of the relatrix affirming the truth of the facts to be added by way of amendment, and this was sufficient to make the amendment valid, even though the relatrix was not sworn to the affidavit as amended. The Maynard case effectually disposes of all questions relative to the statute of limitations. It is there held that a complaint like the one in controversy is not void, and for that reason can be amended. The amendment merely makes definite an averment which does not exclude every possibility. The suit from beginning to end relates to the same child, born of the same mother, begotten by the same father. The amendment does not introduce a new cause of action, and therefore the statute of limitations is not a defense. *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340; *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416.

The judgment of the County Court is affirmed.

William Hermann v. John H. Glass.

1. JURY—*Province to Determine Questions of Fact.*—It is the province of a jury to determine questions of fact, and when there is evidence justifying the verdict it will not be disturbed.

Memorandum.—*Replevin.* Appeal from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

TEAVOUS & WARNOCK, attorneys for appellant.

DALE, BRADSHAW & TERRY, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This action in replevin was commenced by appellee against Glass, a constable, to recover possession of corn in the field, alleged to be the property of appellee and to have been wrongfully taken and wrongfully detained by Glass. The latter pleaded *non cepit, non detinet*; property in Joseph Hermann, and a plea of justification, setting up that Joseph Hermann was a tenant of Fred Kahle; that rent was due and unpaid; that the corn replevied was the property of Joseph Hermann and was grown on the premises so rented, and was subject to be taken to satisfy the unpaid rent, under a distress warrant which was issued by Kahle to defendant as constable, to execute within six months after expiration of lease, and justifies the taking and detention under said warrant. Issues were joined on these pleas, a trial was had, the jury returned a verdict finding the issues for plaintiff, and assessed his damages at \$100. Defendant's motion for a new trial was overruled and a proper judgment was entered on the verdict, to reverse which defendant took this appeal. The only material question is, who rented of Kahle the premises on which said corn was grown for the crop year of 1891—William Hermann, or Joseph Hermann?

If the former was tenant of Kahle for that year, a distress warrant against Joseph would not justify the taking and detention of the corn belonging to William. We think the evidence warranted the jury in finding that plaintiff rented said premises from Kahle for the crop year of 1891, cultivated and raised thereon as such tenant the corn taken, and that the evidence justified the verdict. We find no error in the instruction complained of, requiring the reversal of the judgment, and it is affirmed.

**Cleveland, C., C. and St. L. R. R. Co. v. Comfort Monks,
Administratrix of Edward Monks, deceased.**

1. **SPECIAL INTERROGATORIES—*Evidentiary Facts.***—It is not error to refuse to submit a special interrogatory which calls for a finding of evidentiary facts.

2. **SPECIAL INTERROGATORIES—*What is an Evidentiary Fact.***—Where a defendant asked for the submission of the following special interrogatory—"Did the deceased use the slightest diligence to protect himself from injury when he started and proceeded to cross said railroad, and if so, in what did such diligence consist?"—*it was held* properly refused, as the clause "and if so, in what did such diligence consist," called for the evidence on which the jury based the special finding asked for.

3. **NEGLIGENCE—*Use of Care and Diligence.***—The general rule is that in actions for personal injuries the plaintiff must prove that he was using due care at the time he was injured. It is a question of fact for the jury to determine from the evidence, whether or not the deceased was in the exercise of due care for his personal safety when he was struck by the defendant's engine. The proper determination of this question depends largely upon the circumstances surrounding the person injured at the time of or immediately preceding the injury.

4. **NEGLIGENCE—*Measure of Care, etc.***—What might be required of a person in one case, to establish the fact that he was using due care for his personal safety when injured, might not be required in another case under different circumstances.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

WISE & McNULTY, attorneys for appellant.

DALE, BRADSHAW & TERRY, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This is a suit brought by appellee, as administratrix of her deceased husband, to recover damages to her as his widow, resulting from his death, alleged to have been occasioned by the negligence of appellant in failing to give

either of the signals as required by the statute, to apprise deceased of the approach of its locomotive and train to a public highway crossing, over which, while he was with due care attempting to cross defendant's track, defendant's engine ran into and struck him, and so injured him that he died. The jury found defendant guilty, and assessed plaintiff's damages at \$1,000, and plaintiff took this appeal. The first reason urged for reversal is that the trial court erred in not requiring the jury to answer the fifth, sixth, seventh, eighth and ninth special interrogatories submitted by appellant, as follows:

5th. If the deceased had been listening, and paying attention before he started across said track, or when the whistle was blown, would he not have heard the same?

6th. Did the deceased, before he stepped on said track, look to see if a train was approaching?

7th. Did the deceased, before he stepped on said track, listen to see if a train was approaching?

8th. Could not the deceased, had he looked after passing the line of cars on the side track, and while he was about five feet from the west rail of the main track, have seen the approaching train and been able to avoid the accident?

9th. Did the deceased use the slightest diligence to protect himself from injury when he started and proceeded to cross said railroad, and if so, in what did such diligence consist?

Each of these interrogatories call for a finding of evidentiary facts, not ultimate facts. The ninth interrogatory calls for a finding, not only of a fact which counsel for appellant insists is an ultimate fact, viz., did deceased use the slightest diligence to protect himself from injury when he started and proceeded to cross said railroad? but also calls for a finding of an evidentiary fact, viz., in what did such diligence consist? If the contention of counsel is correct that the failure on the part of deceased to use the slightest diligence to protect himself from injury when he started and proceeded to cross defendant's track, was a failure on his part to exercise reasonable care for his own protection *at*

the time he was killed, the interrogatory should have asked for a finding only as to the fact whether he did or did not then use the slightest diligence for such purpose, and omitted that part which called for the evidence upon which the jury based the special finding asked for. Such interrogatories our Supreme Court have held to be improper in *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 133, and *T. H. & Ind. R. R. Co. v. Voelker*, 129 Ill. 540. In our judgment the trial court did not err in refusing to submit said interrogatories to the jury. It is next contended on behalf of appellant, that plaintiff below "failed to prove that deceased was struck and injured on a public crossing;" or "that the bell was not rung, or the whistle blown as required by law;" or "that deceased was using due care, and was killed in consequence of the failure to give the crossing signals." An examination of the evidence in the record satisfies us the proof was ample to establish the fact that the place where deceased was struck by defendant's engine was a public crossing, and no evidence to the contrary was introduced. The evidence was conflicting as to the fact of giving either of the statutory signals, but if the jury believed the testimony of plaintiff's witnesses upon that point, they were thereby justified in finding that no bell was rung and no whistle was blown on defendant's engine, as required by the statute, when it was approaching said crossing. If they found defendant was guilty of such negligence, they could also fairly conclude from the evidence that deceased was struck by the approaching engine in consequence of a failure to give either of the signals required by the statute to apprise him of its approach. But it is said "plaintiff failed to prove deceased was using due care at the time he was struck," and hence had no legal right to recover.

We understand the general rule to be, that such proof is essential to a recovery in this class of cases, and it is a question of fact for the jury to determine from the evidence, whether or not the deceased was in the exercise of due care for his personal safety when he was struck by defendant's engine, and the proper determination of this question depends largely upon the circumstances surrounding the per-

son injured at the time of or immediately preceding the injury. Hence, what might be required of such person in one case, to establish the fact that he was using due care for his personal safety when injured, might not be required in another case under different circumstances. In this case it appears that immediately before the accident, deceased and some others were talking together on the track of the C. & A. R. R., about fourteen feet west of the west rail of defendant's main track. That between these tracks was the side track of defendant's road, on which, south of the crossing, were a number of cars obstructing the view of a person to the south who was going east over the crossing, so that he could not see an approaching train coming from the south until he stepped off the east side of the side track, and on the north side of the crossing were also cars on the side track, leaving a space of thirty-six to forty feet between the cars, within which a person must walk, who desired to cross over. Deceased remarked to the persons with him on the C. & A. track, he believed he would go down to Venice and get shaved, and started east over the crossing toward his home, and as he stepped off the side track and was about to step on defendant's main track, its passenger train from the south came rapidly along and he was struck by the pilot beam of the engine, which extended six inches over the west rail, and was thrown quite a distance north and instantly killed. Two of the persons he had just left were witnesses and testified they were standing about fourteen feet west of him and saw the engine strike him. That no bell was rung or whistle blown on the train. That they did not hear, or see the train until the engine struck him. That he walked deliberately as men usually do. If these witnesses tell the truth, deceased was unwarned of the approach of the train, and in the absence of such warning might well feel secure in attempting to cross, relying upon defendant's performance of its statutory duty.

And the jury might also fairly conclude from the evidence that the train came so rapidly and suddenly upon him, after he reached the place at which he could first have seen it, that looking would have been unavailing to protect himself

from the collision, or that he was so startled and terrified by being so suddenly and unexpectedly put in peril of his life as to be incapable of acting for his own protection.

If the jury so found, deceased was not guilty of contributory negligence, such as would bar recovery, and exercised that due care under the circumstances required by the law. It is suggested by counsel for appellant in addition to the negligence of deceased in failing to stop and look before attempting to cross defendant's track, that he was in a troubled and dejected state of mind, and therefore paid no attention to sounds of warning as he ought to have done; that he carelessly pulled his hat down over his eyes, so that he could not see well, and that he intended to go down the railroad track of defendant toward Venice.

The abstract does not contain all the evidence touching these matters, and it does not appear, when the evidence in the record is considered, that deceased had his hat pulled over his eyes when he approached defendant's track, or that he intended walking down that track to Venice, but was walking in the direction of his home, which was on the east side of the track, some distance beyond it. And if he was disturbed in mind, it does not follow that for such reason he did not pay attention and hear signals, because those who were with him, who were not in that state of mind, heard no signal nor sound of a train. The reciprocal rights and duties of those in charge of trains when approaching highway crossings, and of persons traveling over the same, are quite fully discussed and defined in many adjudicated cases in this State, and among others, *I. & St. L. R. R. Co. v. Stables*, 62 Ill. 313; *C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454; *C. & N. W. R. R. Co. v. Dunleavy*, *supra*, and the views we express are in harmony therewith.

There was no error in giving plaintiff's instruction complained of. The jury were not misled by the omission to state what the statutory signals were, and if defendant felt they were not fully informed by the evidence upon that matter, an instruction giving such information could have been asked for.

Finding no cause for reversal, judgment is affirmed.

City of Mt. Carmel v. Arabella Guthridge.

1. **NEGLIGENCE—What is.**—Where employes of a city were engaged in building a crossing over a ditch, quit work in the evening leaving the crossing unfinished, and without placing any guard, light or other device to warn or protect pedestrians, *it was held*, that the city was guilty of negligence.

2. **CITIES AND VILLAGES—Not Insurers Against Accidents.**—A city is not an insurer against accidents; it only has to exercise reasonable care to make and keep its sidewalks and crossings reasonably safe.

3. **COMPARATIVE NEGLIGENCE—The Rule Stated.**—Where there is slight negligence on the part of the person injured, contributing to the injury, there must be gross negligence on the part of the defendant in comparison therewith, in order to justify a recovery.

4. **ERROR—Will Not Always Reverse.**—It is not every error that will reverse, where substantial justice has been done.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

Plaintiff's 1st, 7th and 8th instructions referred to in the opinion of the court:

(1.) The defendant city is bound, in law, to use all reasonable care, caution and supervision to keep its streets and street crossings in a safe condition for travel, in the ordinary modes of traveling, by night as well as by day, and if it fails to do so, is liable for injuries sustained in consequence of such failure, provided the person injured is exercising reasonable care and caution; and the fact that the plaintiff may, in some way, have contributed to the injury sustained by her, will not prevent her recovery, if by ordinary care she could not have avoided the consequences to herself of the defendant's (city's) negligence.

(7.) By the term gross negligence, as used in these instructions, is meant a wrongful act or omission, willfully and maliciously done or omitted, or wantonly reckless conduct, showing an utter disregard of the rights of others.

(8.) While a person is bound to use reasonable care to avoid injury, yet he is not held to the highest degree of care and prudence of which the human mind is capable, and to authorize a recovery for an injury, he need not be wholly free from negligence; provided his negligence is but slight, and the other party be guilty of gross negligence, as compared to each other, as defined in these instructions. And in this case, although the jury may believe from the evidence that the plaintiff was guilty of some slight negligence, yet if you further believe from the evidence that the plaintiff's negligence was but slight, and that the defend-

City of Mt. Carmel v. Guthridge.

ant was guilty of gross negligence, as compared to each other, as explained in these instructions, and that the injuries complained of were caused thereby, then the plaintiff is entitled to recover.

STATEMENT OF THE CASE.

On the west side of Chestnut street, at its intersection with Fourth street, on September 15, 1892, the appellant was constructing a crossing over Fourth street to take the place of an old and insufficient one that had been located about fourteen feet east of the new crossing. Chestnut street extends north and south, while Fourth street extends east and west. The crossing had been constructed and completed from the south side of Fourth street to within fourteen feet of a ditch, about three feet deep, that ran east and west along the north side of Fourth street, and over which said crossing would extend when completed. There was a brick side-walk along the west side of Chestnut street, extending to the north and south lines of Fourth street, at the intersection, which formed the abutments for said crossing. From the north end of the incompleted crossing to the ditch, where the accident occurred, a distance of some fourteen feet, there was, for the first part of said distance, a slight depression, and then the incline to the ditch became greater. The crossing was a few inches above the earth at the north and uncompleted end.

The street superintendent and his men quit work at that crossing about 5:30 o'clock on the evening of the 15th of September, and did not place any guard, light or other device to warn or protect pedestrians who might attempt to pass over Fourth street, at that crossing. Between 7 and 8 o'clock that evening, the appellee, in company with her niece, a Miss Phipps, started from the house of her sister, situated at the southeast corner of said intersection of streets to go west over Chestnut street, along the south line of Fourth street, and from the west side of Chestnut street started north over Fourth street and over said new crossing to reach Mr. Parkinson's house, situated at the northwest corner of said intersection, for the purpose of getting some fresh water.

She testified that she supposed the street was safe, did

not see any signal, and never thought of anything being wrong until she stepped off the end of the unfinished crossing and did not recover herself until she struck the abutment on the north side of the ditch, into which ditch she fell and was assisted out by some passer-by. She testified that some of her teeth were knocked loose, two fillings knocked out, and was injured in her head, knees, sides and ankle, but at the time did not believe she was badly injured and said so. She went to the theater that night but found she was suffering great pain, and on the next morning went to her home at Indianapolis, where on examination of her limb by a surgeon, it was found to be so injured as to require it to be incased in a plaster of paris cast, which was kept on for over six weeks. She claimed at the trial that it was still weak.

At the time of the accident she was on a visit to her sister, Mrs. Mundy, and had never been over that street before, and did not notice the old crossing fourteen feet east of the new one. The appellee's evidence tends to show the night was dark, while there was evidence on the part of appellant to show that it was not so dark but that appellee could see, had she been looking.

GEO. P. RAMSEY, attorney for appellant.

MUNDY & ORGAN, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The points made by appellant in the argument, are: 1. That the judgment is not sustained by the evidence. 2. That instructions 1, 3, 4 and 10, given for the appellee, are erroneous. There is no complaint that the verdict was excessive or that the appellee did not sustain serious injury. Under the first head, it is claimed that appellee should have taken the old crossing, fourteen feet east of the new one, and which she reached in passing over Chestnut street before she reached the new crossing. As shown by the statement of facts, she was a stranger in the city, and had never been on that street before. Certainly, without some previous knowledge, she could not be expected to pass over

a crossing that was fourteen feet out of its proper place; neither did the law require her to be looking for a crossing at such a place. From the point of the old crossing, had she seen it, the evidence does not show that she could have observed that the new crossing was not completed. In fact, we are impressed by the whole evidence that the night was dark, and only general outlines could be observed.

That the city was negligent in leaving the ditch unguarded and unlighted that night, we think is clearly established. It was gross negligence, for which no excuse is offered in this record.

It is also claimed appellee was negligent in allowing herself to be precipitated into the ditch, after stepping off the north end of the new crossing, some fourteen feet distant. There were only two witnesses who testified how that occurred, the appellee and her niece. They in effect say that it was so dark that they did not observe the end of the crossing, and when they stepped off, they were unable to recover themselves until they fell in the ditch. It would appear that they might have recovered themselves before proceeding that distance, yet this court can not say that they should have done so or could have done so.

There is nothing in this record to indicate that they voluntarily precipitated themselves into the ditch. Only a few steps were required to take them into the ditch after leaving the crossing; what is sometimes termed a "running fall," occasioned by a person attempting to gather or recover himself from starting to fall, would carry them that distance.

However, not knowing that there was another crossing at an unusual place in the street, had the appellee walked off the crossing and on the earth for fourteen feet, and then fell in the ditch, it could not be said from anything that appears in this record, that she would have been guilty of contributory negligence. She would have had a right to suppose, being a stranger, that there was not a pit-fall unguarded ahead of her. We are not prepared to say the evidence shows that there was sufficient light for her to have seen it.

The evidence sustains the verdict, which was for the sum of \$550.

The first instruction given on behalf of appellee is subject to criticism and does not correctly state the law. The eighth instruction, however, states the law fully and fairly as to the doctrine of comparative negligence, and in the seventh instruction given on behalf of appellee, "gross negligence" is defined in terms of "intentional wrong," which is much stronger than was required. *J. S. E. Ry. Co. v. Southworth*, 135 Ill. 250.

There was no error in giving the third instruction for appellee. It was not hypothetical, but stated a proposition of law correctly.

The tenth instruction is subject to the criticism of limiting the care required after appellee stepped off the crossing. But as there is no evidence to show that appellee saw the other crossing, or reason assigned why she, a stranger, should have seen it at the place it was located, this error was harmless.

The propositions of law asserted by appellant's counsel are correct: that the city is not an insurer against accidents; that it only has to exercise reasonable care to make and keep its sidewalks and crossings reasonably safe; that persons in using them, must on their part exercise ordinary care to avoid injury, and that care is measured by the known condition existing, and that where there is slight negligence on the part of the person injured, contributing to the injury, there must be gross negligence on the part of the defendant in comparison therewith, in order to justify a recovery. The first instruction violates this last proposition of law, yet it is not every error that will reverse where substantial justice has been done.

The evidence is not deemed so conflicting as to the right of recovery as to justify a reversal of this judgment on that ground, especially in view of the seventh and eighth instructions that were given for appellant. The judgment will be affirmed.

Clark & Bosquit, Partners, v. Edward Laumann.

1. **PARTNERSHIP—Partner's Authority to Settle Suits After Dissolution, etc.**—A partner's authority to collect and receipt for accounts due the firm, either before or after the dissolution of the partnership, does not validate a release obtained from him for a nominal consideration, while he is in a state of intoxication brought about by the debtor of the firm for the purpose of enabling such debtor to accomplish a fraudulent design.

2. **PARTNERSHIP.—Power of Partner to Accept Payment and Release Debts.**—As one partner can accept payment of a debt due to the firm, so he can effectually release and give a valid receipt for such debt. It is, however, to be remembered, that although one partner has implied authority to collect debts owing to the firm, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his co-partners, it will not preclude the firm from recovering the money.

3. **RELEASE—Given by Partner in Fraud of the Firm.**—A release given by one partner will not bind the firm if the releasing partner acts in fraud of his co-partner, or in collusion with the debtor.

4. **RELEASE—Executed by a Partner in Fraud of his Co-partner's Rights.**—If it can be shown that one partner has, in fraud of his co-partner and in collusion with the debtor, executed a release for the purpose of preventing them from enforcing a just demand, the debtor will not be allowed to plead such release as a defense to an action against him.

5. **AMENDMENTS—Power of the Court to Impose Terms.**—A court may impose terms, or require an amendment to be made immediately, or refuse to permit an amendment to be made at all, where the party asking leave is trifling with the court, or seeking to delay proceedings unreasonably.

6. **AMENDMENTS—Discretion in Allowing not to be Abused.**—Where a good pleading is amended in the manner suggested by the court, and the court is constrained by a modification of his views to sustain a demurrer to it as amended, leave should be granted, if asked, to refile the original pleading, or to amend it. A refusal to permit this to be done is error.

Memorandum.—Assumpsit. Error to the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

WM. P. LAUNTZ, attorney for plaintiffs in error.

COCKRELL & MOYERS, attorneys for defendant in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This suit was brought by the plaintiffs to recover for work done and materials furnished by them, as partners, in the erection of a certain two-story brick building for the defendant. During the progress of the suit, the defendant filed a plea, alleging that after the commencement of the suit, the plaintiffs, for the consideration of \$75, had released the defendant from all claims of every kind and had directed the dismissal of all suits brought by the plaintiffs against the defendant, then pending in the City Court of East St. Louis or in any other court.

The second amended replication to this plea, alleges that the release, which, by the way, was not under seal, was obtained by fraud and circumvention; that some months before the same was signed, Clark and Bosquit, the plaintiffs, had dissolved partnership, and that the defendant knew this fact when he procured the signing of the supposed release; that a few days prior to the signing of this instrument, the defendant offered the plaintiffs \$400 in discharge of the demands referred to in said plea, which sum the plaintiffs, who then and there demanded more money, refused to receive; that at the same time the plaintiffs informed the defendant that the balance of the moneys demanded in the declaration in this suit was due the plaintiff Bosquit, on settlement which had been made between the partners, and that the plaintiff Clark had no further interest in the same, and was not authorized in any manner to settle for the same; that afterward the defendant endeavored by threats and offers, which are set forth in the replication, to obtain said release from said Clark, but did not succeed in doing so; that thereupon the defendant, who was a saloon-keeper, caused said Clark to become intoxicated for the purpose of obtaining said release, and procured the signing of the same by threats, persuasion and the use of intoxicating liquors; that said Clark thereupon departed from this State and has not re-

turned, and that all of this was accomplished without the knowledge or consent of the plaintiff Bosquit. It is not directly averred, but probably appears inferentially from this replication, that said Clark received \$75 from the defendant as a supposed consideration for the signing of the release.

Why is not this replication a sufficient answer to the plea of release? Does a partner's authority to collect and receipt for accounts due the firm, either before or after the dissolution of the partnership, validate a release obtained from him for a nominal consideration while he is in a state of intoxication brought about by the debtor of the firm for the very purpose of enabling such debtor to accomplish his fraudulent design? We think not. To answer this question affirmatively, would be to throw the protecting mantle of the law over the grossest of frauds.

In 1 Lindley on Partnership, 2d American Edition, marginal page 135, it is said: "As one partner can accept payment of a debt due to the firm, so he can effectually release and give a valid receipt for such debt. It is, however, to be remembered, that although one partner has implied authority to get in debts owing to the firm, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his co-partners it will not preclude the firm from recovering the money. Nor will a release given by one partner bind the firm, if the releasing partner acts in fraud of his co-partners and in collusion with the debtor."

In the same work, marginal pages 145 and 146, it is said: "If it can be shown that one partner has, in fraud of his co-partners and in collusion with the defendant, executed a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defense to an action against him. Thus, in *Barkér v. Richardson*, the plaintiffs, Barker and Owen, had been partners, but they had dissolved partnership; and it was agreed that Barker should get in the debts owing to the firm, and if necessary sue for the same. The defendant was indebted to the firm and had notice of the above agreement. He was also a creditor of Owen on a private

account, and Owen, against Barker's consent, gave a receipt for the partnership debt, and, after the commencement of the action by Barker for the recovery of that debt, gave the defendant a formal release. The evidence showed that the release was given to defeat the action, to prevent Barker from recovering the debt due the firm, and as part of a scheme for discharging Owen's private debt to the defendant. Under these circumstances the release was not allowed to be pleaded."

In *South Fork Canal Co. v. Gordon*, 6 Wall. 561, the canal company owed certain partners over \$76,000 for work and materials on an aqueduct, and over \$16,000 for preliminary work on the same. The company secretly obtained from one of the partners a release of all of the partnership claims for \$2,000 in cash and \$3,000 more in the company's stock at par. It was held that the release was void, being a gross fraud on its face.

We deem it unnecessary to refer to other authorities bearing upon the same question. If a release obtained under the circumstances stated in the foregoing authorities is void, certainly a release obtained by making one of the partners drunk for the purpose of defrauding the partnership can not be availed of as a defense to an action for the amount due the firm. The second amended replication is a sufficient answer to the plea of release in this case. It appears from the record, however, that a demurrer was sustained to the second amended replication, and that the judge sustaining the demurrer stated at the time how the replication might be amended so as to present a good answer to the plea. Thereupon the plaintiffs filed the third amended replication in conformity with the views of the court, alleging therein, among other things, an agreement by the defendant to pay all the moneys referred to in the release to Bosquit in accordance with the agreement and request of the plaintiffs. This allegation showed a complete novation, and rendered the replication bad as showing a right of action in Bosquit only, whereas the suit was being prosecuted in the names of Bosquit and Clark.

A demurrer was properly sustained to the third amended replication. Immediately thereafter the plaintiffs asked leave to refile their replication, referring undoubtedly, as the record shows, to the second amended replication. The court refused to grant this request and rendered judgment for the defendant. The request for leave to "refile replication" was equivalent to a motion for leave to amend. A court may impose terms, or require an amendment to be made immediately, or refuse to permit an amendment to be made at all where the party asking leave is trifling with the court or seeking to delay proceedings unreasonably. But in this case the court refused to permit the refile of the replication at any time or on any terms. This, at least, is the effect of the decision of the court. Where a good replication is amended in the manner suggested by the court, and the court is constrained, by a modification of his views, to sustain a demurrer to the replication as amended, leave should be granted to refile the original replication, or to amend, and a refusal to permit this to be done is error.

The judgment is reversed and the cause is remanded for proceedings in accordance with the views herein expressed.

Mary O'Leary, Administratrix, etc., v. The Wabash Railroad Company.

1. FELLOW-SERVANTS—*Who Are.*—Two crews of men in the employ of a railroad company, daily co-operating and consociating together in the business of switching in the same yard, one delivering cars, and the other receiving the same cars, are fellow-servants.

Memorandum.—Action for damages sustained from death from negligent act. Error to the Circuit Court of St. Clair County; the Hon. ALONZO D. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

The statement of facts is contained in the opinion of the court.

WISE & McNULTY, attorneys for plaintiff in error.

GEO. B. BURNETT, attorney for defendant in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Thomas O'Leary was employed by the Wabash Railroad Company as one of an engine crew, engaged in switching cars in the company's yards in East St. Louis. There were two crews engaged in this work—one in the upper and the other in the lower yard. It was the business of the crew in the upper yard to throw, or "kick" cars across certain railroad crossings to the crew in the lower yard, and it was the business of the latter to receive and handle the cars thus delivered to them. Each crew had a foreman who gave orders to his own crew, and both crews were under the command of a common yard master. The two crews were thus associated together, daily, in the business of switching cars in the company's yards. The work of the one was the complement of the work of the other. One delivered cars, and the other received them. Their usual duties brought them into habitual consociation, so that they were able to exercise an influence upon one another, promotive of proper caution in the discharge of their mutual duties. On a certain day, while this state of affairs was subsisting, the crew at work in the upper yard "kicked" twenty cars over the crossings, into the lower yard. O'Leary, the fireman of the engine in the lower yard, had charge of that engine at the time, and was backing the same in the direction of the approaching cars. He reversed the engine, but not in time to prevent the collision which caused his death. This suit was brought by the mother of the deceased, as the administratrix of his estate, to recover damages arising from the death of her son. A verdict was returned and a judgment was rendered in favor of the defendant.

The plaintiff in the court below brings the record to this court by writ of error, and asks this court to review the

record and to reverse the judgment. It is alleged that the cars which caused the accident were running at a rate of speed prohibited by the ordinances of the city of East St. Louis, and had but one brakeman to control them, whereas at least two brakemen were required for the proper management of twenty cars. It is not necessary, however, to consider the question of negligence in any of its phases, inasmuch as the case must be disposed of upon other grounds. The pertinent and controlling inquiry here is, were the two crews fellow-servants? If they were, the judgment must be affirmed, regardless of the question of negligence. So, on the other hand, if there is evidence tending to show that the two crews were not fellow-servants, the judgment must be reversed. This is true, because the trial court, at the conclusion of the evidence, instructed the jury to find for the defendant, which was a proper instruction if there was no evidence tending to show that the relation of fellow-servants did not exist, and a fatally erroneous instruction, if there was evidence tending to establish that proposition. On the evidence as disclosed by the record, we hold that there was no evidence tending to prove the allegations of the declaration that the deceased and those employes of the company who caused his death were not fellow-servants. In *C. & N. W. R. R. Co. v. Moranda*, reported in 93 Ill. 302, and afterward on the second appeal in 108 Ill. 576, it was held that in order to constitute servants of the same master fellow-servants it is necessary either that they should be actually co-operating at the time of the injury in the business in hand, or that their usual duties should bring them into habitual consociation, so that they might exercise an influence upon one another promotive of proper caution for their mutual safety. We are aware of no decision of our Supreme Court modifying the rule as thus laid down.

In *O. & M. Ry. Co. v. Robb*, Admr., 36 Ill. App. 627, it was held that two railroad engineers in the same grade of service, each running over the same track, are by reason of their ordinary and usual duties, to be regarded as fellow-servants. *A fortiori* it is true, that two crews daily co-oper-

ating and consociating together in the business of switching in the same yard, one delivering cars and the other receiving the same cars, are fellow-servants under the definition given in the Moranda case and adhered to in the last reported case bearing upon the question. But it is said that the court should state what constitutes the relation of fellow-servants, and the jury should determine whether or not that relation exists under the circumstances of the particular case. This is true. It has been so held in a number of cases, one of which is L. E. & W. R. R. Co. v. Middleton, 142 Ill. 550. But does the Supreme Court mean to state that where the evidence shows conclusively that the relation of fellow-servants exists and there is no evidence tending to show the contrary, the trial court must nevertheless submit the question to the jury and approve a verdict finding that to be true, which the record shows to be absolutely untrue? The propounding of the question is the refutation of the proposition. Any other mixed question of law and fact, which, when there is a conflict in the evidence, must be submitted to the jury, may be withdrawn from the jury when the facts are uncontradicted and show conclusively that the plaintiff is not entitled to recover. The court determines whether or not there is evidence tending to establish a certain proposition, and if the court finds that there is such evidence, the jury are required to determine what weight the evidence is entitled to, and to decide whether or not it does establish the controverted proposition. We see no reason for the application of a different rule when the question is whether or not certain employes of a common master were fellow-servants. The judgment is affirmed.

John Whitlow v. Newton Champlin.

1. **MECHANICS' LIENS.**—*Proceedings to Enforce.*—The proceeding to enforce a mechanic's lien is statutory and the provisions of the statute must be complied with in order to give the court jurisdiction.

2. **MECHANICS' LIEN.**—*Filing Statement in the Office of the Circuit*

Whitlow v. Champlin.

Clerk.—The filing of the statement in the office of the circuit clerk as required by Sec. 4 of Ch. 82, R. S. entitled "Liens," is a prerequisite to the right to file a petition to enforce the lien, and necessary to give the court jurisdiction.

Memorandum.—Mechanic's lien. Appeal from the Circuit Court of Marion County; the HON. BENJAMIN R. BURBROUGHS, Judge, presiding. Heard in this court at the August term, 1893. Reversed and remanded. Opinion filed March 23, 1894.

STATEMENT OF THE CASE.

The appellee contracted with appellant for the construction of a dwelling house on the latter's premises. He furnished the labor and material necessary for that purpose. Not being paid therefor, he filed a petition to enforce his lien under the mechanic's lien law. The defense interposed is: 1. A failure to comply with the contract in workmanship and in the kind of material furnished. 2. That appellee failed to file with the clerk of the Circuit Court of the county in which the dwelling house was situated, any statement of account, etc., verified by affidavit, as required by the amendatory act of 1887. The latter point alone is presented for our consideration. No separate statement of account, as provided by section 4, was filed with the circuit clerk prior to the time of filing the petition.

The petition was filed in the Circuit Court on the 7th day of October, 1892, to which were attached exhibits "A" and "B."

Exhibit "A" is "copy of specifications for J. M. Whitlow's house, 18x26; main building 16x22; add. main building, roof $\frac{1}{2}$ pitch; porch, 16 feet; ceiling, 9 feet down stairs; addition, 9 foot ceiling, etc." Exhibit "B" is "Extras ordered by J. M. Whitlow."

At the conclusion of exhibit B is the following:

State of Illinois, }
Marion County. } ss.

Newton Champlin, being duly sworn, deposes and says on oath, that the foregoing statement of his account is true and correct, and that the sum of \$711.83

is still due him after allowing all credits from John Whitlow, on account of carpenter work, building and furnishing material under original contract, and also for extra material and work mentioned in the above account.

NEWTON CHAMPLIN.

Subscribed and sworn to before me this 6th day of October, 1892.

T. P. MEAGHER,
Circuit Clerk.

Exhibit A has no date. At the conclusion of the specifications is the following: "\$618.15 to be paid, cash, when completed. One or two hundred dollars to be advanced if desired."

Exhibit B contains the itemized value of the material furnished and of the work done, but gives no dates.

Neither exhibit contains a description of the property to be charged with the lien. The petition itself sets out the contract, its date, terms, etc., the description of the property, alleging a compliance with the contract, the furnishing of extras, etc.

APPELLANT'S BRIEF, H. C. GOODNOW AND L. M. KAGY,
ATTORNEYS.

The statute which gives a mechanic's lien is in derogation of the common law and must receive a strict construction. No person can obtain a lien under it, unless a clear compliance is shown with all the requirements of the statute. *Belanger et al. v. Hersey et al.*, 90 Ill. 71; *Butler & McCracken v. Gain*, 128 Ill. 27.

Mechanics' liens are entirely the creation of statute and are controlled absolutely by the provisions, requirements and conditions of the law which creates them. *Swift v. Martin*, 20 Ill. App., 515.

The filing of a statement of account or demand verified, is a condition precedent to the right to a lien, and a failure to comply with the requirements of the statute in that respect prohibits the enforcement of the lien. This verified statement filed with the clerk of the Circuit Court, is

jurisdictional. McDonald v. Rosengarten, 35 Ill. App. 71; McDonald v. Rosengarten, 134 Ill. 126; A. R. Beck Lumber Co. v. Halsey, 41 Ill. App. 349.

T. E. MERRITT, attorney for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The section referred to in the statement provides that "Every creditor or contractor who wishes to avail himself of the provisions of this act, shall file with the clerk of the Circuit Court of the county in which the building * * * is situated, (1) a just and true statement of account or demand due him after allowing all credits, (2) setting forth the times when such material was furnished or labor performed, (3) containing a correct description of the property to be charged with the lien, (4) and verified by an affidavit.

Any person *having* filed a claim for a lien *as* provided in this section, may bring a suit at once to enforce the same by bill or petition in any court of competent jurisdiction in the county where the claim for a lien has been filed."

The proceeding to enforce a mechanic's lien is statutory, and as frequently decided, the provisions of the statute must be complied with in order to give the court jurisdiction. Butler et al. v. Gain, 128 Ill. 23, and cases there cited. The position of the appellee is, that the filing of the petition with the exhibits attached, sworn to, is a compliance with the statute, and that it is not necessary to file a separate claim prior to the filing of the petition. In view of the decisions of the court, as well as the language of the section referred to, we are constrained to take a different view and hold that the filing of such claim in compliance with said section is a prerequisite to the right to file a petition to enforce the lien or to give the court jurisdiction.

The section is very explicit in providing that if the "creditor or contractor *wishes to avail himself* of the provisions of the act, he *shall* file with the clerk a just and true statement of account," etc. Then it further provides, as if to

leave no doubt of the purpose of the legislature, "Any person *having filed* a claim for a lien * * * may bring a suit at once."

Clearly by this language the bringing of the suit must be preceded by filing a claim "as provided in this section."

It has been contended, however, that sections 4 and 28 should be construed together, as, in effect, one section, in which case it is insisted the filing of a claim with the clerk of the Circuit Court is only required as to other creditors, incumbrancers or purchasers.

There is much force in this construction, if it is assumed the purpose of the requirement was merely to protect the interest of third parties, as creditors, incumbrancers, or purchasers. But evidently the legislature intended by Sec. 4, to make such provision apply for the benefit of the owner as well. By this requirement the owner is furnished with definite information of the extent and particular character of the claim, which can not be shifted, changed or enlarged; in other respects the requirements may also be beneficial to the owner. Had it been intended to apply solely to third parties, and to the exclusion of the owner of the property, different language would have been used.

To exclude owners from the benefit of the provisions of section 4 by construction, would apparently be doing violence to the plain meaning of words.

This court in the case of *Boals v. Dutrup*, 40 Ill. App. 62, said with reference to Secs. 4 and 28: "These sections being construed together do not obviate the necessity of filing the verified statement provided for in Sec. 4." In the case of *Campbell v. Jacobson et al.*, 145 Ill. 389, it is said, with reference to the effect of Sec. 28 on Sec. 4, that "It has not the effect of dispensing with the filing of the claim, where the lien is sought to be enforced only against the owner of the premises." "There is nothing giving countenance to that view in the language of section 4, its provisions being, that *every creditor or contractor* wishing to avail himself of the provisions of the statute should file the statement." The decree is reversed and the cause remanded.

Mobile and Ohio R. R. Co. v. Albert J. Harmes.

52	649
58	185
59	649
78	214
72	217

1. **MASTER AND SERVANT—*Master's Duty to Furnish Safe Appliances.***—The law imposes upon the master the duty of exercising reasonable care in supplying the servant with proper and safe instrumentalities for the performance of his duties and maintain the same.

2. **MASTER AND SERVANT—*Efficient Method of Discharging the Duty.***—In the operation of cars an efficient and necessary method of discharging that duty is to maintain a careful system of inspection to see that the necessary appliances in use thereon, are in good order and sufficient to answer the purpose for which they are intended.

3. **MASTER AND SERVANT—*To What the Rule Applies.***—The rule of reasonable care in supplying the servant with proper and safe instrumentalities, applies in the case of cars belonging to other companies, which the servant is required to operate in the course of the master's business.

4. **MASTER AND SERVANT—*Corresponding Duty of the Servant.***—The servant using the appliances furnished by the master, in the necessary performance of the work he is employed to do, must exercise reasonable care for his personal safety. Such care as a reasonably prudent person would take under like circumstances. This is a duty imposed by the law and the use of reasonable diligence to discover defects in such appliances is one of the means of discharging that duty.

5. **MASTER AND SERVANT—*Whether the Master has Exercised Such Care, a Question for a Jury.***—Whether the master has exercised the reasonable care required of him by the law, and the servant has also exercised the reasonable care so required of him, are questions of fact to be determined by the jury from the evidence.

6. **MASTER AND SERVANT—*Notice to Employes as to Defects in Appliances, etc.***—Where a notice printed as a part of the official time table of a railroad company compelled its employes to know whether the property with which they had to work was in good and safe condition, it was held that the notice did not impose upon the employe a duty different from that required by the law, and if the employe used reasonable care to inform himself, and the appliances appeared not unsafe, he can not be charged with negligence notwithstanding the notice.

7. **JURY—*The Judges of the Credit to be Given to the Testimony.***—The jury, who see and hear the witnesses when testifying, are the judges of the weight and credit to be given to their testimony, and the verdict ought not to be disturbed unless it is apparent they have misunderstood or disregarded the evidence or were misinformed as to the law.

8. **VERDICTS—*When Not to be Set Aside.***—Where there is an irreconcilable conflict in the testimony, this court will not reverse the judgment where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict.

9. **DAMAGES—When Excessive.**—The amount of damages is a question for the jury to determine, and unless the amount is so large as to indicate that the jury in fixing it were influenced by passion or prejudice, the verdict ought not to be set aside on the ground of excessive damages.

10. **PLEADING—Defects and Omissions After Issue Joined—Cured by the Verdict.**—When there is a defect, imperfection, or omission in any pleading, either in form or substance, which would be fatal on demurrer, if the issue joined thereon be such as necessarily requires, on the trial, the proof of the facts so defectively stated or omitted, and without such, it is not to be presumed the judge would direct the jury to give, or the jury would have given, the verdict, such defect or omission is cured by verdict.

Memorandum.—Action for personal injuries. In the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; defendant appeals. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

Copy of notice referred to in the opinion:

“SPECIAL NOTICE.

It is the settled policy of this company not to have in use any tools, implements, cars or machinery that may be unsafe to handle, and it is the duty of every employe to know that the property with which he has to work is in good and safe condition, and if not, to report the fact to his immediate superior at once, and to the superintendent as soon as practicable; and should such employe continue to use such unsafe property or machinery, he does it at his own risk.”

STATEMENT OF THE CASE.

Appellee brought this suit against appellant to recover damages for personal injuries, alleged to have resulted from the negligence of defendant in furnishing him with a car in a train of cars, with a chain attached to a brake-rod upon said car, which chain was necessary to be used in setting the brake thereon, and was old, unsound, weak, defective and unfit for use, and dangerous to be used by appellee, a brakeman in appellant's employ, in setting the brakes upon said car, and while he was engaged in performing his duty in

setting the brakes upon said car, and particularly while attempting to perform his duty as brakeman by setting the brake, to the brake-rod of which was attached said old, rusty, unsound and defective chain, and while exercising due care for his own safety, and not then aware that said chain was in an unsound, unsafe and dangerous condition, or unfit for use, said chain did break by reason of its unsoundness, weakness and unfitness for use, and appellee being on the top of said car, and while attempting to set said brake, said chain broke, and by reason of its breaking he was thrown upon the defendant's railroad track, was run over by defendant's said cars, his left arm so broken and mangled that amputation became necessary, and said arm was amputated, and other injuries resulted which are specifically averred. The second count is similar to the first, except it is averred that the defective appliance which broke and caused the injury, was an unsound, insecure, unsafe and dangerous fastening to the brake-staff, called an eyebolt, to which the brake-chain was attached, and which broke and gave way by reason of being insecurely fastened, defective, unsound, unsafe and dangerous. The jury returned a verdict finding defendant guilty and assessed plaintiff's damages at \$5,000. Judgment was entered on the verdict for that sum and costs, and defendant took this appeal.

LANSDEN & LEEK, attorneys for appellant.

R. T. LIGHTFOOT, attorney for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellant contends that before appellee could rightfully recover, the law required him to establish by the greater weight of the evidence the two following propositions:

1st. That the brake-chain or eyebolt in question, was defective in the respect charged in the declaration, and that defendant knew of such defect, or by the exercise of ordinary care, could have ascertained the same.

2d. That plaintiff did not know of such defect, and that

he could not, by the exercise of ordinary care, have ascertained the same.

The law imposes upon the master the duty of exercising reasonable care in supplying the servant with proper and safe instrumentalities for the performance of his duties, and maintaining the same. *C. & A. R. R. Co. v. Kerr*, Vol. 35, N. E. Rep. p. 1118. In the operation of cars an efficient and necessary method of discharging that duty is to maintain a careful system of inspection to see that the necessary appliances in use thereon, are in good order and sufficient to answer the purpose for which they are intended, and this rule of reasonable care with reference to proper machinery and inspection, applies in the case of cars belonging to others, which the servant is required to operate in the course of the master's business. *Sack v. Dolese et al.*, 137 Ill. 129.

The servant using the appliances furnished by the master, in the necessary performance of the work he is employed to do, must exercise reasonable care for his personal safety; that is, such care as a reasonably prudent person would take under like circumstances. This is a duty imposed by the law, and the use of reasonable diligence to discover defects in such appliances, is one of the means of discharging that duty. Whether the master has exercised the reasonable care required of him by the law, and the servant has also exercised the reasonable care so required of him, are questions of fact to be determined by the jury from the evidence.

The foregoing rules are applicable to the facts in this case, and have been announced as the law in repeated decisions of the Supreme Court and the Appellate Courts of this State. Counsel for appellant insist that appellee failed to establish by a preponderance of the evidence, that he did not know of the existence of the alleged defects in said appliances, and could not, by the exercise of ordinary care, have ascertained the same. We think the evidence justified the jury in finding that appellee did not know of the existence of the defects, and had used the ordinary care required by the law to ascertain the condition of the said appliances

before starting on his trip, taking into consideration the opportunity afforded him and the duties the master required to be performed by him before the train left, and that he was not guilty of negligence in this regard. In this connection it is said the printed notice to employes, read in evidence, compelled appellee to *know* whether the chain and eyebolt in question were in good and safe condition. We are not prepared to hold this notice imposed a duty upon him different from that required by the law, and we think if he used reasonable care to inform himself, and the appliances appeared not unsafe, he could not be charged with negligence, barring his right to recover.

It is insisted, also, that appellee failed to establish by the greater weight of evidence, that the brake-chain or eyebolt in question was defective in the respect charged in the declaration, and that defendant knew of such defect, or by the exercise of ordinary care, it could have ascertained the same. The car was a box car, loaded with sugar, and was received by appellant at Meriden, Mississippi, to be transported over its line to St. Louis, Missouri. The evidence satisfies us it was an old car, and that appellant, by its servants, who acted as car inspectors, knew that fact, or by exercising reasonable diligence might have known it, and hence ought to have known the appliances thereon were likely to be old and worn and probably unfit to be used for braking on a heavily loaded car, which was to be transported so great a distance. Full opportunity was given the inspectors, if on duty as they ought to have been, at different points along the line to examine these appliances in the day time, and had any one of them carefully made such examination, the defects, if they existed, must have been discovered, and if the appliances in fact were defective at the time of the accident, it would be a fair inference under the evidence, that the inspectors knew it, or by using reasonable diligence could have known it in ample time before the accident, to supply those that were reasonably safe. The main contention, however, on behalf of appellant, is that the evidence does not support the averments that the brake-chain was

defective, or the eyebolt defective or insecurely fastened. Moore, a car inspector in defendant's employ at time of accident, testified he examined brake-chain and connections in question carefully at 5:30 A. M., and immediately after it occurred, when the train stopped in Murphysboro, the first stop, and one mile and a half from place of accident; that the chain was old, worn out and broken, worn thin at the ends where the links joined; that one link was missing; one link also was cracked.

As corroborative of this statement that the chain was old and worn and the eyebolt either defective from like causes or insecurely fastened, is the fact already mentioned that the car to which the same were attached was an old car, and the further facts that the chain was broken, and the eyebolt not to be found. But we are told this witness is not to be believed and we ought to disregard his testimony, because he has been contradicted by several witnesses for appellant, as to condition of the chain and as to the fact he testified to—that the chain was wrapped around the brake-staff and was detached from the brake-rod beneath the car. The following are the witnesses who testified for appellant about the condition of the appliances: Curlin, the conductor in charge of train, who testified there was no eyebolt there. "I never had hold of chain; looked and found it all right, except eyebolt gone; it did not look like a worn-out chain; I did not look at it sufficiently to tell its condition as to apparent soundness; can't say there was not a link or two gone from end of chain, or whether it was old or not; did not examine to see if chain was worn." Younghouse, appellee's car inspector at Murphysboro, testified he examined car on the morning accident occurred; that the chain was an ordinary chain, in pretty fair condition; was not a bad chain.

On cross-examination he testified the train was all ready to go when he saw the chain; that he did not go between the cars because he did not want train to pull out on him, and yet after saying this, he testified he examined chain pretty close, and what he saw of the outside of the chain was all right, it was sound. Barnes, freight conductor, in the em-

ploy of appellant, testified he examined chain carefully at East St. Louis, on arrival of the train there, and said, "I don't know whether bolt broke, or the nut came off; it was one of the two; the chain seemed to be good and all right; it seemed to be the right length; it seemed to me that the bolt caused all the trouble; I got down and looked at chain." On cross-examination witness testified eyebolt was gone; that he would not swear a link or two links had not been broken out of the chain at any time prior to the time he saw it; that he couldn't say whether there was or not. Homer, freight conductor, in employ of appellant, accompanied Barnes and testified he then examined car; that the eyebolt was gone; examined chain carefully; had it in his hand; it looked to be sound, a good sound chain; did not look to be worn any to speak of. To the question, "I will ask you to state to the jury whether it was an old, worn-out and defective chain?" witness answered, "Well, the chain was in ordinarily good fix; the chain was good enough; the chain was in good sound condition so far as I could see."

On cross-examination he testified he did not know whether chain was broken or not. Dodd, in charge of defendant's car department at East St. Louis, was present at the time Curlin was there, and testified the eyebolt was gone; that he examined chain pretty closely. It was a good chain, he considered it a good chain of ordinary average size. To the question, "State again to the jury whether this chain was an old, worn-out and defective chain, or otherwise?" witness answered, "It was a sound chain so far as I could see and I examined it closely." On cross-examination he testified, "I inspected this particular car; they wanted me to make a close examination and I did, and remember distinctly what I saw." That he had "never seen the chain since, don't know where it is, can't tell whether it is here or not; think it was not taken off of car. I did not order it taken off." We have reproduced all the testimony given by those witnesses on behalf of appellant who claimed to have seen or examined these appliances, each of whom

testified the chain was detached from the brake-staff and the majority of whom also testified the eyebolt by which the chain would have been attached to the brake-staff, if the brake had been in proper working order, was gone. This testimony, in connection with the undisputed fact that some part of the brake appliances, when being used by appellee, must have given way, and the testimony of Moore, corroborated as before mentioned, together with the failure on the part of appellant to retain and produce the chain itself for the inspection of the jury, justify the conclusion that the accident occurred by reason of the defective condition of the chain, or eyebolt, or by the latter being insecurely fastened, and this, with the other evidence, establishes the fact that appellee was necessarily using the defective appliances in the performance of his duty at the time they gave way, and he was thereby thrown between the cars and injured as averred. Much stress is laid upon the fact that Moore was contradicted by several witnesses as to his statement that one end of the brake-chain was wrapped round the brake-staff and the other detached from the brake-rod. It does not follow, even if he was mistaken in this, that his testimony as to the defective condition of the chain ought to have been rejected by the jury, or that we should discredit it.

The jury, who see and hear the witnesses when testifying, are the judges of the weight and credit to be given to their testimony, and the verdict ought not to be disturbed, unless it is apparent they misunderstood or disregarded the evidence or were misinformed as to the law. This rule has been long established and generally adhered to by the courts of review in this State. In *Ill. Cent. R. R. Co. v. Gillis*, 68 Ill. 317, the court say: "If any rule of court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances by a fair and reasonable intendment will authorize a verdict, notwithstanding it may appear to be against the weight of evidence." So in the case of *Calvert v.*

Carpenter, 96 Ill. pp. 67, 68, it is said: The judge and jury who try a case have vastly superior advantages for the ascertainment of truth and detection of falsehood, over this court sitting as a court of review. There is an inherent impossibility of determining with any decree of accuracy what credit is due to a witness from merely reading the words spoken by him, even if there were no doubt as to the words. Many of the real tests of truth by which the artful witness is exposed can not be transcribed upon the record, and hence can never be considered by this court. For this reason the rule is firmly established that where, as in this case, there is an irreconcilable conflict in the testimony, this court will not reverse the judgment where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict.

The ruling in these cases is cited with approval in the case of *Shevalier v. Seager*, 122 Ill. pp. 567-68, where it is said: "In this state of testimony, it was the peculiar province of the jury to determine which set of witnesses was right, and which was wrong. This the jury did, and the conclusion reached by them has received the sanction of the judge who presided over the trial, and in whose presence and hearing these witnesses gave their testimony. Notwithstanding that, we are asked to set aside the verdict of the jury, sanctioned by the judge who heard the cause, and reverse the decree of the lower court mainly on the ground that the verdict of the jury is not sustained by the weight of the evidence. That we have no right to do. This is abundantly settled by the authorities." The same rule is held in *Daley v. Ogden*, 28 App. Rep. 319; *Brown v. City of Galesburg*, *Ibid.* 321; *Lamb v. Johnson*, 31 App. Ct. 98. The criticism made as to the instructions given for plaintiff and the contention that the jury were thereby misled or misinformed as to the law, we do not concur in; on the contrary, the instructions given for appellant were more favorable to it than the law warranted, and we perceive no good ground for holding the jury were erroneously instructed to the prejudice of appellant.

The damages are alleged to have been excessive. This is a question also for the jury to determine, and unless the amount is so large as to indicate the jury in fixing that amount were influenced by prejudice or passion, the verdict ought not to be set aside on the ground of excessive damages. They saw the arm and the character of the mutilation, and heard the testimony of plaintiff touching the pain and suffering he had undergone and still suffered from his injury, and we can not say, in view of the evidence, the amount assessed was too large. The last point relied on and to which our attention is invited, is that there is no averment in the declaration that defendant had actual or constructive knowledge of the alleged defects, and such allegation being essential, the omission is not cured by verdict. The record discloses that no demurrer was interposed, but that plea of general issue was filed, and *similiter*, that evidence was introduced without objection by defendant, tending to prove such knowledge, and defendant also introduced evidence tending to prove the converse, and asked for and the court gave on its behalf an instruction that before the jury could find the defendant guilty they must believe that the evidence shows defendant had notice, actual or constructive, of the defective condition of the brake-chain or eyebolt. If the averments were not sufficient, a demurrer should have been interposed, so that the declaration might have been changed and a specific averment inserted.

Where there is any defect, imperfection or omission in any pleading, either in form or substance, which would be fatal on demurrer, yet if the issue joined be such as necessarily required on the trial the proof of the facts so defectively stated or omitted, and without which it is not to be presumed the judge would direct the jury to give, or the jury would have given the verdict, such defect or omission is cured by verdict. 1st Chit. Pl. (7th Am. Ed.) 711, 712; L. S. & M. S. Ry. Co. v. O'Conner, 115 Ill. p. 260; Keegan v. Kinnare, 123 Ill. 280; Sec. 6, Chap. 7, Starr & Curtis' Rev. Stat.

It was averred in each count of the declaration, that defend-

Village of Sorento v. Johnson.

ant carelessly and negligently furnished the defective chain and eyebolt to be used by plaintiff, and by means of its carelessness and negligence in furnishing and providing him with said defective appliance, and permitting it to remain on said car in such unsafe and dangerous condition to be used by him, the injury resulted. It is manifest these facts were material to be proved, and the negligence charged could not be established unless the evidence should show actual or constructive notice to defendant of such defects. The case of E. & T. H. R. R. Co. v. Deed, an Indiana case, 33 N. E. Rep. 355, is not in point; a demurrer to this complaint was interposed, and held to have been erroneously overruled. Joliet Steel Co. v. Shields, 134 Ill. 209, does not present a case like this in material respects, and we can not hold it overrules or was intended to overrule the cases above cited. In Libby et al. v. Schuman, No. 5, Vol. 146, Ad. sheets, Ill. Rep. 548, the Joliet Steel Co. case is referred to, and among other things it is said: "It should also be noticed in that case, the ordinary presumptions which obtain after verdict, and by operation of which a defective statement of a good cause of action is said to be cured, were excluded by an instruction given by the court to the jury. In this case no such instruction was given, so that even if the declaration is one that might have been held to be defective on demurrer, the defect is one which is cured by verdict."

The judgment is affirmed.

Village of Sorento v. Margaret Johnson.

1. NEGLIGENCE—*Notice to Municipal Authorities.*—In an action for injuries received by reason of a defective sidewalk, the defect (a loose board) had existed for some time and was known to one member of the village board. It appeared that upon discovering the defect the member of the board nailed the board down, but the stringers were insufficient to hold it. *It was held* that the jury were justified in finding that the walk at the place of the accident was out of repair, and that such fact was known to the authorities.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Pond County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 23, 1894.

Plaintiff's second instruction referred to in the opinion of the court:

The jury are instructed that the defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair, and to render them reasonably safe for all persons passing on or over the same, and if the jury believe from the evidence that the defendant failed to use all reasonable care and precaution to keep its sidewalks in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby, without negligence or want of care on plaintiff's part, then she is entitled to recover in this suit.

STATEMENT OF THE CASE.

The appellee, on the 7th day of November, 1891, in company with her daughter, was passing along the east side of Main street in the village of Sorento, when the daughter stepped on a board in the walk, which flew up, tripped the appellee, causing her to fall, whereby she was seriously injured. The declaration contained two counts, the first alleging the unsafe condition of the walk, and that it was negligently allowed so to remain by the village authorities; the second alleging the improper construction of the walk. It appears from the evidence offered under the first count that a board or boards at or very near the place of the accident had for some time before and up near to the time of the accident been observed to be loose; that it had been loose for about a month; that persons had tripped on it. One of the members of the village board, who was at the time a member of the street and alley committee, testified that about two weeks before the accident he saw a Mrs. Moss trip on a loose board at this place, and also saw the appellee trip and fall, after each time he had nailed the board down. He testified that the trouble was, the stringers were in such condition that they would not hold the nails. The verdict was for the sum of \$600.

C. E. Cook, attorney for appellant.

WM. H. DAWDY, attorney for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The points made by appellant's counsel in his argument are, first, that the judgment is not sustained by the evidence; second, that the verdict is excessive; third, that there was error in giving the second instruction for appellee and in refusing instructions A, B and C, offered by the appellant. The statement of facts show the boards in the walk at the place of this accident had occasionally been loose for some time, which was known to at least one member of the village board. While it is true the boards so discovered to be loose by such member were immediately nailed down again, yet the evidence tends sharply to show that the stringers were insufficient to hold the nails. The jury were justified in finding that the walk at the place of the accident was out of repair, and that such fact was known to the authorities. If so, the village was negligent and liable for an injury arising to a person therefrom, if such person at the time was in the exercise of ordinary care. There is no claim made in the argument that the appellee was not in the exercise of such care. She was proceeding along the walk in the usual way and without knowledge that the board was loose, when one end tripped her, causing a hard fall. The evidence shows that her limb was swollen and bruised, and that she has to wear a support for her knee. If the evidence of appellee is to be believed, and it is not attacked, she received quite serious injuries, and the verdict was not excessive. There was no error in giving the second instruction in behalf of appellee. It laid down the law that appellant was required to use all reasonable care and precaution to keep its sidewalks in a reasonably safe condition for persons to pass over the same. The word "*all*" might have been properly omitted, but to use it was not error. The instructions A and C, offered on behalf of appellant and refused by the court, were embodied substantially in other instructions given on its behalf.

There was no evidence to support instruction B, which

was to the effect that the village was not liable for damages arising from a loose board, which was wrongfully loosened by some person without the consent of the authorities and of which the authorities had no notice. There was evidence tending to show that boys were playing with a board already loose, not that they had loosened it. The instruction was also misleading, as the jury might have made it apply to the daughter stepping on the board and loosening it, in which case, although the stringer was insufficient to hold a nail, the jury would have been required to find for the defendant. It also ignored the issue presented by the second count of the declaration, as to the improper construction of the walk. There being no material error in record, the judgment is affirmed.

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152 223

Jacob Hoehn v. Chicago, P. & St. L. Ry. Co.

1. CARRIERS OF PASSENGERS—*When a Person is Not a Passenger.*—A person does not become a passenger by inducing the conductor in disregard of his duty and in fraud of the rights of the company to permit him to ride without the payment of fare.

2. CARRIERS OF PASSENGERS—*When a Person is Not a Passenger—Application of the Rule.*—A person who furnished liquor to the conductor of a train, which he knew did not carry passengers, to secure his consent to ride without the payment of fare, does not become a passenger for hire within the meaning of the law applicable to carriers of passengers.

3. QUESTION OF FACT—*Forcing a Person Off the Train.*—The question as to whether the conductor of a railroad train compelled a person who was riding upon it to jump off is one of fact for a jury to determine.

4. CONTRIBUTORY NEGLIGENCE—*What is.*—Where the conductor of a freight train told a person riding thereon that it was safe in his opinion to jump off while the train was in motion, if not otherwise induced to do so, such an act would be contributory negligence and would bar a recovery for damages sustained in so doing.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1898, and affirmed. Opinion filed March 28, 1894.

Appellee's third and fifth instructions, the giving of which is assigned for error:

Third. If the jury believe from the evidence, that the plaintiff entered a caboose car attached to a special freight train of defendant, at or near Long Lake, intending to go to Edwardsville, Ill., and that said train was not a passenger train, or one that carried passengers, that plaintiff did not pay any fare for being transported on said train, and that afterward, and while the train was in motion, the plaintiff went upon the step of the caboose car and stood upon the step of the same, and while the train was in motion, voluntarily got off of said train, or was thrown off by the motion of the train, and thereby received the injury complained of, then plaintiff was guilty of contributory negligence in producing the injury, and he can not recover in this case.

Fifth. The court instructs the jury further, that if they believe from the evidence that the conductor of the train mentioned, pushed the plaintiff, Hoehn, as he, Hoehn, was about to get out of the caboose car, and used insulting language, ordering the plaintiff to get off the train, and in consequence thereof the plaintiff got onto the step outside of the car and stood upon the same while the train was moving, and that this occurred at or about the time the train was crossing Vandalia street, still, if they further find from the evidence that the conductor, after so pushing the plaintiff, let him go and did not again take hold of plaintiff, or attempt to take hold of him, and that the plaintiff continued to ride on said step, and did so ride for a distance of some 800 feet, and that plaintiff deliberately selected a place to alight from said car, and did in fact jump off of said car while the conductor was in another part of said car and was using no effort to force the plaintiff off of said car, then said plaintiff was guilty of negligence in so getting off of said car, and has no right to recover a verdict in this case.

STATEMENT OF THE CASE.

The declaration contains two counts. The first alleges that on the 4th day of October, 1891, the plaintiff, at or

near the station of Stallings, on the line of defendant's road, became a passenger for reward, to be carried from thence to Edwardsville, a station on the line of defendant's road; that when the train, upon which he became a passenger as aforesaid, reached Edwardsville, it was willfully and negligently run past the platform and depot there, a distance, to wit, of two hundred yards, when plaintiff, while using due care, the train being in motion, was forced and compelled to alight from said train by the conductor, who laid hands upon the plaintiff, and told him that unless he jumped off then and there, he would kick him off, whereby the plaintiff was then and there forced to step from said train, and in doing so, was thrown with great violence to and upon the ground, by means whereof he was seriously injured, etc.

The second count alleges that the plaintiff became a passenger at a water tank near Stallings station, by the consent of the conductor, who agreed to stop the train at Edwardsville, which, when the train arrived there, he refused to do, but ran it through Edwardsville, to the eastern limits thereof, where the conductor ordered the plaintiff to get off said train, while the same was in motion, which the plaintiff refused to do, whereupon the conductor carelessly and negligently placed his hands upon the plaintiff, and willfully forced him to alight from the door of said car in said train, to and upon the ground with great force and violence, whereby he was injured, etc.

The material facts as disclosed by the evidence are, that the plaintiff lived at Edwardsville, and owned and ran a saloon and place of amusement near Stallings station. On Sunday morning, the 4th day of October, 1891, he and a man named Stark went down from Edwardsville to this resort. About eleven o'clock in the forenoon, a through freight train stopped at the water tank to obtain a supply of water, and while there, as claimed by the plaintiff, the conductor went into the resort, whereupon inquiry was made if the train would stop at Edwardsville, and if they, plaintiff and Stark, could ride. The answer being in the affirmative, Stark set up the drinks and plaintiff the cigars, for the conductor, and Stark also gave the conductor a bottle of

whisky, which was drunk on the way to Edwardsville, so that, as claimed, the conductor became intoxicated and also the brakeman. Stark testified he "paid the conductor two drinks of whisky and a bottle of whisky for our transportation." No fare was paid.

When the train arrived at Edwardsville, some nine or ten miles from Stallings station, it did not stop at the depot, and the plaintiff, in attempting to alight while the train was in motion, was hurt. The caboose did stop from two to four hundred feet beyond where plaintiff was hurt.

The plaintiff and Stark claim that the conductor, in a rough and profane way, ordered plaintiff off while the train was going, and took hold of him and pushed him to the door of the car, which door was in the side, and then ordered him off or he would be kicked off, and that under the influence of these threats he attempted to leave the train.

The plaintiff in a part of his testimony says that after the conductor got him on the steps of the car he left him, and thereafter the plaintiff rode, as appears by the evidence, some 800 feet, before he jumped. He says: "I selected a good place after he left the door and jumped so as not to get hurt." Stark got off after the train had slowed up, about sixty yards after Hoehn got off, and was not injured. He says, "the train was running slow when I got off."

The caboose in which the parties were riding was an ordinary box car, with no end platforms, but with side doors narrowed, and a step on each side to aid in getting in and out of the car. There had been no trouble whatever between the conductor and either Stark or the plaintiff at any time. There was evidence to show that plaintiff knew that train did not carry passengers, although he denied such fact.

The conductor admits that he and the brakeman drank liquor with Stark, but denies that he agreed to take them as passengers; that he shoved the plaintiff off or ordered him off. He claimed that the train was running about five or six miles an hour when the plaintiff got off and was at a full stop when Stark got off some six or seven car lengths farther along. He was discharged by the company very soon thereafter.

The jury found for the defendant.

The following interrogatories were propounded to the jury on the part of the defendant:

1st. Was the conductor using any force to compel the plaintiff to leave the train at the time that the plaintiff in fact got off of said train? Which was answered, no.

2d. Did not the plaintiff deliberately select a place at which to jump off of said train, while said train was in motion and while no force was being used to compel him to get off of said train? Which the jury answered, yes.

APPELLANT'S BRIEF, CYRUS L. COOK AND E. BREEZE GLASS,
ATTORNEYS.

The third and fifth instructions given for the defendant are fatally defective and erroneous, and should not have been given to the jury; because an instruction in an action for injury by negligence is fatally defective if it ignores the fact that the party asking it is required to use due care and caution. *Lake Erie & W. R. R. Co. v. Morian*, 140 Ill. 117; *Lake Shore & M. S. Ry. Co. v. O'Conner*, 115 Ill. 258; *Rolling Mill Co. v. Morrissey*, 111 Ill. 650; *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 210.

Negligence is a question of fact and not of law, and therefore an instruction which defines particular acts, or their omission, as negligence, is erroneous, and should not be given. *City of Chicago v. McLean*, 133 Ill. 154; *St. Louis, A. & T. H. R. R. Co. v. Russell*, 39 Ill. App. 445; *Jones v. Johnson*, 12 Ill. App. 286; *Lake Shore & M. S. Ry. Co. v. O'Conner*, 115 Ill. 258; *Chicago & E. I. R. R. Co. v. Tilton*, 26 Ill. App. 363; *Meyers v. I. & St. L. Ry. Co.*, 113 Ill. 386; *C. T. & H. Co. v. O'Brien*, Admx., 19 Brad. 231; *C., M. & St. P. R. R. Co. v. Krueger*, 23 Ill. App. 639; *C. & A. R. R. Co. v. Fisher*, 141 Ill. 614.

Whether a reasonably careful man would have done differently than plaintiff did, is a question for the jury, and the court should not instruct the jury that certain facts, if proved, constitute negligence. Neither should such facts be assumed when there is a controversy as to such facts. *Chicago, St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587;

Chicago & A. R. R. Co. v. Barber, 15 Brad. 630; Chicago & N. W. Ry. Co. v. Dunleavy, 27 Ill. App. 438; Terre Haute & I. R. R. Co. v. Voelker, 129 Ill. 540; St. Louis B. Co. v. Miller, 138 Ill. 465; Indianapolis & St. L. R. R. Co. v. Miller, 71 Ill. 463.

It can not be laid down as a rule of law in any given case that certain specific acts are essential to the exercise of ordinary care, or that the absence of such acts is negligence; neither is it negligence *per se* to alight from a street car while in motion, or from a train in motion. This depends upon all the attendant circumstances. Chicago, M. & St. P. Ry. Co. v. Wilson, 133 Ill. 55; Chicago & A. R. R. Co. v. Bonfield, 104 Ill. 223; U. C. St. R. R. Co. v. Williams, 140 Ill. 275; Lake Shore & M. S. R. R. Co. v. Brown, 123 Ill. 162; Wabash Ry. Co. v. Elliott, 98 Ill. 481; L. S. & M. S. Ry. Co. v. Hundt, 41 Ill. 221.

Whether the plaintiff was negligent, and thereby contributed to the injury, and if so, whether to an extent that would bar his recovery in action therefor, must be determined by the jury upon a due consideration by them of all the attendant and surrounding facts and circumstances proved. The court should define negligence, but leave all inferences arising from the facts proved to the jury. City of Chicago v. Moore, 139 Ill. 201; Frana v. Penn. Co., 112 Ill. 398; Hutchinson v. Railway Co., 120 Ill. 587; Meyers v. Ind. & St. L. R. R. Co., 113 Ill. 386; City of Chicago v. McLean, 133 Ill. 148; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 552; Penn. Co. v. Conlan, 101 Ill. 106; C. & E. I. R. R. Co. v. O'Conner, 119 Ill. 597; Penn. Co. v. Marshall, 119 Ill. 399; C. & A. R. R. Co. v. Pennell, 94 Ill. 448; Brown v. City of Aurora, 109 Ill. 165; G. W. R. R. Co. v. Haworth et al., 39 Ill. 346; C. & A. R. R. Co. v. Adler, 28 Ill. 102; City of Mendota v. Fay, 1 Bradw. 418; Meyers v. I. & St. L. Ry. Co., 113 Ill. 386.

APPELLEE'S BRIEF, DALE, BRADSHAW & TERREY, ATTORNEYS.

It is the settled rule in this State that a party receiving injury, in order to recover must show either that he is him-

self free from, and the defendant is guilty of negligence, or if the plaintiff is guilty of negligence that it is slight, and that of defendant is gross or wanton, or the injury willfully inflicted. *Chicago & N. W. R. R. Co. v. Coss*, 73 Ill. 394.

Even if a servant of the railroad, either conductor or brakeman, should tell a passenger that he thought it would be safe for him to leap from the train and left it optional with the passenger to do so or not as he pleased, and in leaping from the train the passenger should be injured, the company would not be liable. *C. & A. R. R. Co. v. Randolph*, 53 Ill. 510; also *C., B. & Q. R. R. Co. v. Sykes*, 1 Brad. 520.

Questions of negligence or comparative negligence are questions of fact which must be left to the determination of the jury. *G. & C. U. R. R. Co. v. Dill*, 22 Ill. 264; *Barkett v. Bond*, 12 Ill. 87.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The material facts, as disclosed by the evidence and as shown in the statement, would justify the jury in finding, first, that the appellant knew the conductor of the freight train had no right to carry him as a passenger, at the time in question; second, that he knew or connived at the procuring of whisky and cigars for the conductor of the train to induce him to allow Stark and himself to ride on the train to Edwardsville, without paying any fare, and that the conductor was so induced to act; third, the conclusion of law upon this state of facts would be, that he was not a passenger for reward, as averred in the first count of the declaration, nor a passenger under any lawful agreement with the conductor that was binding upon the appellee, as averred in the second count of the declaration, so as to impose upon the appellee that duty of care or treatment arising out of the law of that relation. *T. W. & W. R. R. Co. v. Beggs*, 85 Ill. 801; *C., B. & Q. R. R. Co. v. Mehlsach*, 131 Ill. 61-64.

A person does not become a passenger by inducing the conductor, in disregard of his duty, and in fraud of the rights of the company, to permit him to ride without the payment of fare. *T. W. & W. Ry. Co. v. Brooks*, 81 Ill. 292, 295.

The means used to secure the consent of the conductor to ride without the payment of fare, which resulted in both the conductor and brakeman becoming intoxicated, while in charge not only of valuable, but dangerous property if not operated by sober men, in no way lessens the vice of appellant's conduct or mitigates the injury done to appellee thereby.

It follows from the above conclusion that the appellee was under no obligation to the appellant to stop its train at the depot at Edwardsville in order that he might alight on the platform.

That duty was not to wantonly be an aggressor toward third persons, whether they were on or off the train. *C., B. & Q. R. R. Co. v. Mehlsach*, 131 Ill. at p. 65.

This brings us to the charge that the injury to appellant was wantonly inflicted by the conductor forcing him to jump from the train while it was rapidly in motion.

This was a question of fact for the jury, which, in answer to a special interrogatory, found that the conductor did not force the appellant to jump from the car while the train was in motion. On the contrary, the jury found, in answering another interrogatory, that the appellant deliberately selected a place at which to jump off said train while in motion, without any force being used to compel him to do so.

There was evidence to support these findings of fact. Stark, the appellant's companion, got off the train some sixty yards further down the track, as he testified, without injury, when the train was running at a slow rate of speed. The train came to a full stop within a few hundred feet after appellant got off. There does not seem to be any reason or motive that would induce the conductor to force appellant off the car while the train was in rapid motion, when he was so soon to stop his train. There was no quarrel of any kind.

The same motive that would have induced the conductor to force appellant from the train, would have applied to Stark as well, and yet there is no pretense that any force was applied to him. Again, the train could not have been running twelve or fifteen miles an hour when appellant

jumped, and running very slow when Stark got off sixty yards farther down the track. Even if the conductor did tell the appellant it was safe, in his opinion, to jump off while the train was in motion, if not induced thereto otherwise, and he thought it was unsafe, such act would be contributory negligence that would bar a recovery, had he been a passenger. *C. & A. R. R. Co. v. Randolph*, 53 Ill. 510. But he was not a passenger.

Particular objection is made to the third and fifth instructions given for the appellee; we think they properly state the law as applicable to the facts, as found by the jury in this case, or as applicable to the facts as disclosed by this record.

The instructions offered on behalf of appellant and refused by the court, so far as they correctly stated the law, were in substance embodied in the first instruction given.

If there were errors as to ruling on the admission of evidence, they were not material as affecting the verdict actually returned.

Believing that substantial justice has been done, the judgment is affirmed.

Ohio & Mississippi Railway Company v. Frank Long.

1. *WATER-COURSES—Duty of Railroads in Crossing.*—It is the duty of a railroad in crossing a stream of water to construct and maintain a water-way required by the natural lay of the land for the purpose of drainage through its road bed so as to inflict no injury on adjacent lands by reason of diverting the waters of the stream.

2. *EXPERT TESTIMONY—Overflow of Waters.*—In an action for damages resulting from an overflow of water, a witness may testify if he knows as to what has caused the overflow of the water in question, although he is not a scientific expert.

3. *DAMAGES—Opinions of Witnesses Competent.*—Opinions of witnesses as to value, form an exception to the general rule that facts alone are admissible. The law has no other standard to fix the value, as a fact, than the opinions of witnesses.

4. *NEW TRIALS—Improper Conduct of Counsel.*—Remarks of counsel in arguments to the jury are not, as a general rule, sufficient cause to set aside the verdict, unless they are of such an inflammatory nature as to prejudice the minds of the jury.

Memorandum.—Action for damages caused by an overflow of water. In the Circuit Court of Bond County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the August term, 1893, and affirmed. Opinion filed March 28, 1894.

The statement of facts is contained in the opinion of the court.

Plaintiff's instructions referred to in the opinion of the court:

1. The court instructs the jury that it is the duty of a railroad company so to construct and maintain its road across streams and natural water-courses which it intersects, as to inflict no injury upon adjacent lands.

2. The court further instructs the jury that this duty is a continuous one, and that each overflow, caused by the negligence or want of skill of the company, creates a new cause of action for damages to the crops or other property of the rightful possessor of the lands overflowed, although the plaintiff acquired his interest after the creation of the obstruction; and if the jury believe from the evidence that a portion of the water of Little Canteen Creek naturally flowed south across the right of way of the defendant prior to the filling up of the trestle, and would still continue to do so excepting for the construction of embankment complained of, then they must find for the plaintiff, giving such damages as the jury can say from the evidence that he has sustained, if they further believe from the evidence that he had sustained damage by reason of said embankment and partial obstruction of the flow of water as aforesaid.

The remarks of counsel which were assigned as error:

"The testimony of experts in a case should be given no weight; it amounts to nothing as compared with eye-witnesses to an occurrence. In murder cases they usually procure some expert physicians to swear that the criminal was insane, and so in other cases, like this one, they produce experts and pay them \$100 or \$200 each, and try to overcome the evidence of those who have lived right around the place all their lives and were eye-witnesses to the occurrence. I apprehended, however, that the common sense of the thing could not be overcome by these fine-haired gentlemen, these experts, who make it a business to travel around and testify in any case as experts for \$100 or \$200. It is a species of bribery to defeat justice."

* * * * *

"Our witness, James R. Miller, I am sorry to admit, has gone back on his own sworn testimony in ten or a dozen different cases; Miller had sworn in the other cases that the damage to the land was caused by the stoppage of this water on account of the closing of the trestle in the Ohio & Mississippi Railway."

* * * * *

"I have the right to say here, and I say it now, that our witness, James R. Miller, went back on us; but is Mr. Frank Long, the plaintiff in this suit, to suffer on account of that? I have brought as witnesses, Thomas Ramey, Mr. Long, Mr. Owens, Mr. Thompson and a half dozen others as respectable and certainly, hereafter, in the estimation of all the people in that neighborhood, towering high above James R. Miller in honesty and integrity and character. I do not propose to come here and have the case of my client suffer at the hands of somebody. It has been the experience of everybody that some friend in whom he has trusted has taken advantage of him and misled and abused him. Benedict Arnold, an honored officer at one time, proved traitor to his country. It is not the first time in the history of nations or of men that men have had fellows whom they relied upon, and who have stood shoulder to shoulder with them, to abandon and run over to the enemy. Many of you that fought through the late rebellion know that some of your comrades fled in the hour of the battle and joined themselves to the enemy on the other side, and such men are not to be trusted hereafter. And in this case I say, I want you to take the testimony of this man Miller as he swore to it."

POLLARD, WERNER & LESTER, attorneys for appellant.

JAMES M. HAY, attorney for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for damages to his crop from an overflow of water, caused, as alleged, by the negligence of appellant, in closing up a trestle in its road embankment, whereby the water from Little Canteen Creek, that should have gone through said trestle to the south, ran north, upon his land.

The issues tendered by appellant on the facts were, first, that the water from that creek did not naturally run south through said trestle; second, that even if some of the water had run south before the trestle was closed, and was thereafter caused to flow to the north, the damage to appellee's crop was not done thereby, but by other water, the flow of which was not affected by the closing of the trestle. The jury found against the appellant and we are requested to review their finding. In order to do so, we have found it necessary to read the record, from which the conclusions reached upon the evidence are, first, that the trestle that was filled up by the appellant in 1870, formed a way for the

escape of the water to the south, from the Little Canteen Creek, during freshets, which was a natural way for a part of the water to run, in such cases; second, by the filling up of the trestle, water that would have run south was forced to the north, toward the land of the appellee; third, that the crop of appellee, for the destruction of which damages were allowed, was overflowed by water from Little Canteen Creek, which at the time in question was so high as to flood the levee that had been constructed on the south and west of appellee's land; fourth, we are not prepared to say, had Little Canteen Creek had its natural outlet to the south through said trestle for a part of its water to escape in that direction, that it would have raised so high as to overflow the levees constructed to protect appellee's land and destroy his crop. The jury, by its verdict, found that it would not have done so but for such obstruction. There was substantial evidence to support that finding.

It is claimed, however, by the appellant, that deposits would have formed an obstruction to such flow of water, even if the trestle had been left open, and therefore the appellant is not liable.

If the deposits had formed on the appellant's right of way, so as to obstruct such flow of water, it was the duty of appellant to have removed them.

Its duty was not only to construct a water-way required by the natural lay of the land, through its road bed, but its duty also was to maintain such water-way.

The witness Thillman was permitted to state, if he knew, what caused the land of appellee to be overflowed, to which objection was made by appellant on the ground he was merely a farmer and not a scientific expert. It is said the Supreme Court in the case of *Nuetzel*, 32 N. E. Rep. 529, held such evidence was incompetent. We do not so understand that decision.

It held an expert's evidence was competent on this subject, and not that a non-expert's evidence, based on a knowledge or assumed knowledge of the fact, was not competent.

It is also objected that the appellee was allowed to express an opinion as to the amount of damages he sustained. It is said the ruling permitted the witness to usurp the functions of the jury, who were to determine that question. Opinion of witnesses as to value, form an exception to the general rule that facts alone are admissible.

The law has no other standard to fix the value, as a fact, than the opinions of witnesses (*Butler v. Mehrling*, 15 Ill. 488-491), except it might be in case of property that had a standard value. *The I. & W. R. Co. v. Van Horn*, 18 Ill. 257-8.

The objection to the second instruction given for appellee is not considered well taken. It limited the damages to those sustained by reason of the grievance averred in the declaration.

It was for the jury to separate the causes of damage, if required by the evidence, and fix the amount caused by appellant's unlawful act alone. The instruction was within the rule in *C. & N. W. Ry. Co. v. Hoag*, 90 Ill. 339.

Error is assigned on statements made by appellee's counsel in his address to the jury.

He criticised, first, the evidence of James R. Miller, who had appeared as a witness in another case to sustain this class of claims, and second, the force of expert evidence. The record does not show that Miller had testified in ten or a dozen other similar cases, as charged, differently from what he did in this case; nor does it show that the experts were paid \$100 or \$200 apiece, as charged, for their testimony; in those particulars the remarks should not have been made. The counsel, however, had a right to comment, in the way of argument, on the force of expert evidence, and on the fact of any discrepancy that he might have discovered in the testimony of Miller. It would have been well to have omitted some things that were said, but we do not believe the remarks were of that inflammatory character that would or did prejudice the minds of the jurymen. There being no substantial error in the record the judgment is affirmed.

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REVISED RULES

—OF THE—

APPELLATE COURT,

THIRD DISTRICT.

Adopted at the May Term, 1894.

WRITS OF ERROR—SUPERSEDEAS.

RULE 1. Supersedeas—When to be Granted.—No supersedeas will be granted unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, with an assignment of errors written on or appended to the record. Nor will the supersedeas issue until bond be filed with the clerk, according to the order granting the supersedeas. And on every application for a supersedeas, an abstract of the record, with a brief, containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the court or judge to whom the application is made. Every such application, whether made in open court, or to a justice in vacation, must be accompanied by an affidavit showing the solvency of the proposed surety.

RULE 2. Bond, When Executed by Attorney in Fact.—Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attor-

ney contains other powers than the mere power to execute the bond in question; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

RULE 3. Writ of Error, When Made a Supersedeas—Form.—When a writ of error shall be made a supersedeas, the clerk shall indorse upon said writ the following words: "This writ of error is made a supersedeas, and is to be obeyed accordingly," and he shall thereupon file the writ of error with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to-wit :
STATE OF ILLINOIS, } ss.

OFFICE OF THE CLERK OF THE APPELLATE COURT }
FOR THE THIRD DISTRICT OF THE }
STATE OF ILLINOIS. }

I do hereby certify that a writ of error has issued from this court for the reversal of a judgment obtained by.....vs..... in the.....court of.....at the.....term, A. D. 18., in a certain action of.....which writ of error is made a supersedeas, and is to operate as a suspension of the execution of the judgment, and as such is to be obeyed by all concerned.

Given under my hand and the seal of the said Appellate Court, at Springfield, this....day of.....A. D. 18..

....., Clerk.

RULE 4. Writ of Error, to Whom Directed—Commands and Return.—Writs of error shall be directed to the clerk of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court; but where the plaintiff in error shall file in the office of the clerk of this court a transcript of the record duly certified to be full and complete, before a writ of error issues, it shall not be necessary to send such writ to the clerk of the inferior court, but such transcript shall be taken and considered as a due return to said writ.

RULE 5. Process on Writs of Error—Commands—Alias—Pluries.—The process on writs of error shall be a *scire facias* to hear errors, issued on the application of the plaintiff in error to the clerk, directed to the sheriff or other offi-

Rules of Practice.

cer of the proper county, commanding him to summon the defendant in error to appear in court, and show cause if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of court.

RULE 6. Return Day—Entry of Appearance—Notice to Plaintiff.—The first day of each term shall be return day for the return of process, and no party shall be compelled to answer or prepare for hearing unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days notice before the term, of his intention to enter his appearance, and have the cause proceed to a hearing.

RULE 7. Writ of Error Made a Supersedeas—Scire Facias to Hear Errors.—In all cases in which a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the clerk, at the same time order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the said term after joining in error, without giving ten days notice as required by Rule 6: *Provided*, if there be not ten days between the allowance of the supersedeas and the sitting of the court, the cause shall stand continued until the next term, unless by consent of the parties it shall be otherwise ordered.

NOTICE TO PURCHASERS AND TERRE-TENANTS.

RULE 8. Names to be Suggested—Ten Days Notice to be Given.—In all cases wherein guardians, executors or administrators, or others acting in a fiduciary character have obtained an order or decree for the sale of lands in causes *ex parte*, and a sale has been had under such decree or order, and the same shall be brought to this court for revision, the

purchasers or *terre-tenants* of such lands, if known, shall be suggested to the court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error ten days before the first day of the term of court to which the writ of error is returnable, so that said *terre-tenants* may appear and defend.

RECORDS OF INFERIOR COURTS.

RULE 9. How Prepared.—Hereafter the clerks of the inferior courts in this State, in cases of appeal and of error, or *certiorari* in making up “an authenticated copy of the records of the judgment appealed from,” or in sending up a transcript of the record to this court as a return to a writ of error, or *certiorari*, shall certify to this court: *First*—A copy of the process; *Second*—The pleadings of the parties, respectively; *Third*—The verdict in jury trials; *Fourth*—The judgment of the court below, whether tried by the court or jury; *Fifth*—All orders in the same cause made by the court; *Sixth*—The bill of exceptions; and, *Seventh*—The appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account, or other document or writing, or other matter, which, according to the decisions of the court, have been held to constitute no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

RULE 10. Arrangement of the Record—Costs.—The clerk of the court below shall arrange the several parts of the record aforesaid, according to their chronological order. The clerk of this court shall not tax as costs in this court, any matter inserted in such transcript contrary to the rule.

RULE 11. Attorney May Direct by Præcipe.—The party or his attorney, may, by *præcipe*, indicate to the clerk and direct what of the files of the cause shall be copied into the record; and, in such case, if the record shall be insufficient, it shall be supplied at his costs, and, if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.

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TIME FOR FILING RECORDS.

RULE 12. Hearing Docket—What Causes to be Placed on.—No case brought to this court by appeal shall be placed on the court docket for hearing, unless the record is filed within the time now prescribed by law (see Sec. 73, Chap. 110, Practice Act), or within the further time allowed by the court for filing the record; except, in extraordinary cases, the court upon special application, may order a cause to be placed on the hearing docket.

RULE 13. Writ of Error—When Record to be Filed.—No case which may be brought to this court on writ of error, shall be placed on the court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the court for filing the same, except in extraordinary cases, the court, upon special application, may order a cause to be placed upon the hearing docket.

REMOVING RECORDS.

RULE 14. Records not to be Removed Unless upon Special Leave.—No person shall remove from the office of the clerk any record of this court, except upon special leave granted for that purpose. No record shall be taken from the files of the court, except on application therefor to the clerk or his deputy; and it is made the duty of the clerk to report promptly to the court every violation of this rule. The clerk shall be held responsible for the safe keeping and production of the records. Application for leave to remove records may be considered at any time in the discretion of the court.

ASSIGNMENT OF ERRORS.

RULE 15. Errors to be Assigned on Filing the Record.—The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this court, and, on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the court. The appellee or defendant in error shall have the right to assign cross-errors within two days

after the record is filed in this court, and not afterward without special leave of the court. *The assignment of errors and cross-errors must be written upon or attached to the record.*

AGREED CASES.

RULE 16. Affidavit of Good Faith.—No judgment will be pronounced in any agreed case placed upon the records of this court, unless an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

MOTIONS.

RULE 17. Motions, When to be Made.—Motions may be made immediately after the decisions of the court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course.

RULE 18. Order of Making.—Motions are to be made by the attorneys in the following order: *First*—By the Attorney General; *Next*—By the oldest practitioner at the bar, and so on to the youngest.

RULE 19. Special Motions to be in Writing.—All special motions shall be in writing and filed with the clerk, together with the reasons in support thereof, at least one day before they shall be submitted to the court. Objections to motions must also be in writing; oral arguments will not be heard.

RULE 20. When to be Supported by Affidavit.—When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

SECURITY FOR COSTS.

RULE 21. Rule upon Non-Resident.—Upon filing an affidavit that any plaintiff in error is not a resident of this

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State, and that no bond for costs has been filed, a rule shall be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

ABSTRACTS.

RULE 22. Abridgment of the Record—Printed and Bound—Number of Copies.—In all cases, the party bringing a cause into this court, shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstracts to be printed in a neat and workmanlike manner, with small pica type and leaded lines, on one side only, upon white paper; *such abstracts shall be bound in book or pamphlet form.* Five copies of such printed abstracts shall be filed in each case—one for each of the judges, one for the defendant in error or appellee, and one to be filed with the record.

RULE 23. Defendant May Furnish Additional Abstract—Costs to be Taxed.—The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to furnish such further abstract as he shall deem necessary to a full understanding of the merits of the case.

Upon printed abstracts being furnished, in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

BRIEFS.

RULE 24. Required in all Cases—Arguments in Support—Form and Requisites.—Printed briefs will be required in all cases; whether argued orally in full, or in part only, or when submitted on briefs without oral argument. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not

only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed. The brief of appellant or plaintiff in error shall contain in the beginning a concise statement of the case, including in a general way, the form of action, the substance of the pleadings without detail, the substance of the evidence, omitting names of witnesses and all other details, the judgment and the rulings of the trial court complained of. The opposite party will be deemed to accept such statement as correct, except so far as he may indicate by a separate statement of his own to be contained in his brief. *Briefs shall be in book or pamphlet form.*

RULE 25. Number of Copies to be Filed.—Five copies of the brief must be filed in each case, one for each of the judges, one for the opposite party, and one to be filed with the record.

DOCKETING AND HEARING.

RULE 26. People's Causes to have Preference.—Causes in which the people are a party, and in which they have a direct interest in the decision, shall be placed at the head of the docket; all other cases shall be docketed and called for argument in the order in which the records shall have been filed with the clerk.

CALL OF DOCKET—EXPIRATION OF RULES.

RULE 27. Call of the Civil Docket.—The civil docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless for good cause shown, they be placed at the foot of the docket; all unexpired rules will terminate upon the call of the cause for hearing: *Provided*, that if the court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

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CALL OF DOCKET—FILING ABSTRACTS AND BRIEFS.

RULE 28. Filing Abstracts and Briefs.—Hereafter the docket shall be called and abstracts and briefs filed, as follows:

1st. All cases where the record shall be filed with the clerk not less than twenty days prior to the first day of the term, and all causes continued from a former term shall be subject to call at the rate of twenty cases per day on and after the first day of the term, and the plaintiff in error or appellant shall file his abstracts and briefs at least *twelve days prior* to the first day of the term; and the defendant in error or appellee shall file his briefs at least one day prior to the first day of the term.

2d. When the record shall be filed within twenty days, but not less than ten days prior to the first day of the term, such causes shall be subject to call at the rate of twenty cases per day on and after the second Tuesday of the term, and the plaintiff in error or appellant shall file his abstracts and briefs at least *four days prior* to the first day of the term; and the defendant in error or appellee shall file his briefs at least one day before the cause is subject to call.

3d. When the record shall be filed within ten days prior to the first day of the term, or on the first or second day of the term, such causes shall be subject to call at the rate of twenty cases per day on and after the third Tuesday of the term; and the plaintiff in error or appellant shall file his abstracts and briefs at least *nine days prior* to the day said cause stands subject to call on the docket; and the defendant in error or appellee shall file his briefs at least one day before the case is subject to call.

4th. In all appealed causes where the record is filed in term time, after the second day of the term, and which stand for hearing at said term under section seventy-two of the Practice Act, the appellant shall file his abstracts and briefs *within three days* after his record is filed; and appellee shall file his briefs within eight days after the expiration of the time for filing abstracts and briefs by appellant.

RULE 29. Failure of Plaintiff to file Abstracts or

Briefs.—If the plaintiff in error or appellant shall fail to file either his abstracts or briefs with the clerk within the time prescribed by the rules of this court, the judgment or decree of the court below will be affirmed on the call of the docket, unless the time for filing the same shall be extended for cause shown.

RULE 30. Failure of Defendant.—If the defendant in error or appellee shall fail to file his brief in compliance with these rules, the judgment or decree will be reversed *pro forma*, unless the court on examination of the record shall deem it proper to decide the case on its merits.

RULE 31. Oral Arguments.—On the calling of a case for hearing, it may be argued orally, if the rules for filing abstracts and briefs have been complied with, or the case may be submitted on such abstracts and briefs, and the cause, in either case, shall then be taken for final determination; but in case the appellant or plaintiff in error does not argue the cause orally, he shall be allowed three days, after the call, to file a brief in reply.

RULE 32. Oral Arguments upon Motions and Rehearings.—Oral argument will not be heard upon any motion, nor upon the rehearing of a cause, unless specially directed by the court.

RULE 33. Time for Oral Arguments.—The time allowed for each oral argument shall be restricted to one hour on each side, unless otherwise specially permitted.

DAMAGES ON DISMISSING APPEALS.

RULE 34. Failure to File Records.—When appeals from decrees, judgments or orders for the recovery of money, are dismissed by this court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court will award damages against the appellant, at ten per cent upon the amount recovered in the court below if it be less than one hundred dollars, and at five per cent upon the amount of such recovery if it equals or exceeds that sum.

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REHEARING.

RULE 35. Application—Notice.—Application for a rehearing of any cause shall be made by petition to the court signed by counsel, briefly stating the grounds for a rehearing, and the authorities relied on in support thereof. When a rehearing is granted, notice shall be given to the opposite party of the time when such rehearing will be had.

RULE 36. Practice on Rehearing.—The manner of applying for a rehearing shall be as follows:

Within fifteen days after a decision is announced a party applying for a rehearing shall give actual notice in writing to the opposite party or to his attorney, of his intention to make such application, and within thirty days after the decision is announced, shall place on file in the clerk's office five printed copies of his petition.

RULE 37. Supersedeas on Re-argument.—Any two of the justices of this court may, in vacation, issue an order which shall operate as a supersedeas in any case which has been submitted to this court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

RULE 38. Decision in Vacation—Rehearing.—Where a decision in any case is rendered in vacation, and a petition for rehearing shall be presented to either of the justices of this court, if he shall certify that there are probable grounds for granting a rehearing, all further proceedings, authorized by the judgment of this court, shall be stayed until the next term thereof.

APPEALS AND WRITS OF ERROR.

RULE 39. Requirements—Application in Vacation and in Term Time.—In all cases where an application is made in vacation for an appeal from this court to the Supreme Court, the party making such application shall present to one of the judges of this court, a brief statement in writing, giving the title of the cause, the nature and amount of the judgment, order or decree from which the appeal is desired, the date of the rendition of such judgment, order or

decree, and the name of the security proposed, accompanied with an affidavit showing the solvency and sufficiency of the security so proposed. When the application is made to the court in term time the same statement and affidavit will be required.

RULE 40. When a Judgment, Order or Decree of This Court is Dismissed or Affirmed in the Supreme Court.—When an appeal or writ of error shall be prosecuted from a judgment, order or decree of this court to the Supreme Court, and such appeal or writ of error is dismissed, or the order, judgment or decree of this court is affirmed, upon a copy of the order of the Supreme Court being filed in the office of the clerk of this court, he shall, at the request of either party and the payment of all costs for which such party is liable, certify the order of this court to the court below without further proceeding of this court.

EXAMINATIONS FOR ADMISSION TO THE BAR.

RULE 41. Applicants to be Examined in Open Court—Requirements.—Applicants for certificate of qualification for admission to the bar may be examined in open court on the first Thursday of each term. Each applicant shall present to the court a certificate of good moral character, from some court of record in this State, and also his affidavit that he has not applied or been examined for a license within six months preceding. He shall also present his own affidavit and the certificate of a licensed lawyer, or firm of lawyers, setting forth that he has pursued, for the period of two years, the same course of law studies prescribed for students in any of the regularly established law schools of this State, or a course of law studies equivalent thereto, naming the books studied, under the direction and supervision of such licensed lawyer, or firm of lawyers, and submitted to satisfactory examinations by such licensed lawyer, or firm of lawyers, at convenient intervals during such period of study, covering progressively the entire course studied: *Provided, however,* that the time employed as a law student at any law school shall be considered as a

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part of the two years, of which the court shall be satisfied by the affidavit of such student and the certificate of one of the professors of the law school.

RULE 42. May Withdraw Certificate and Affidavit.—Each applicant for examination to be admitted to the bar, may be permitted, after the examination is over, to withdraw his certificate of good moral character and affidavit showing that he is over twenty-one years of age and a citizen of this State, for the purpose of presenting the same to the Supreme Court with his certificate of examination.

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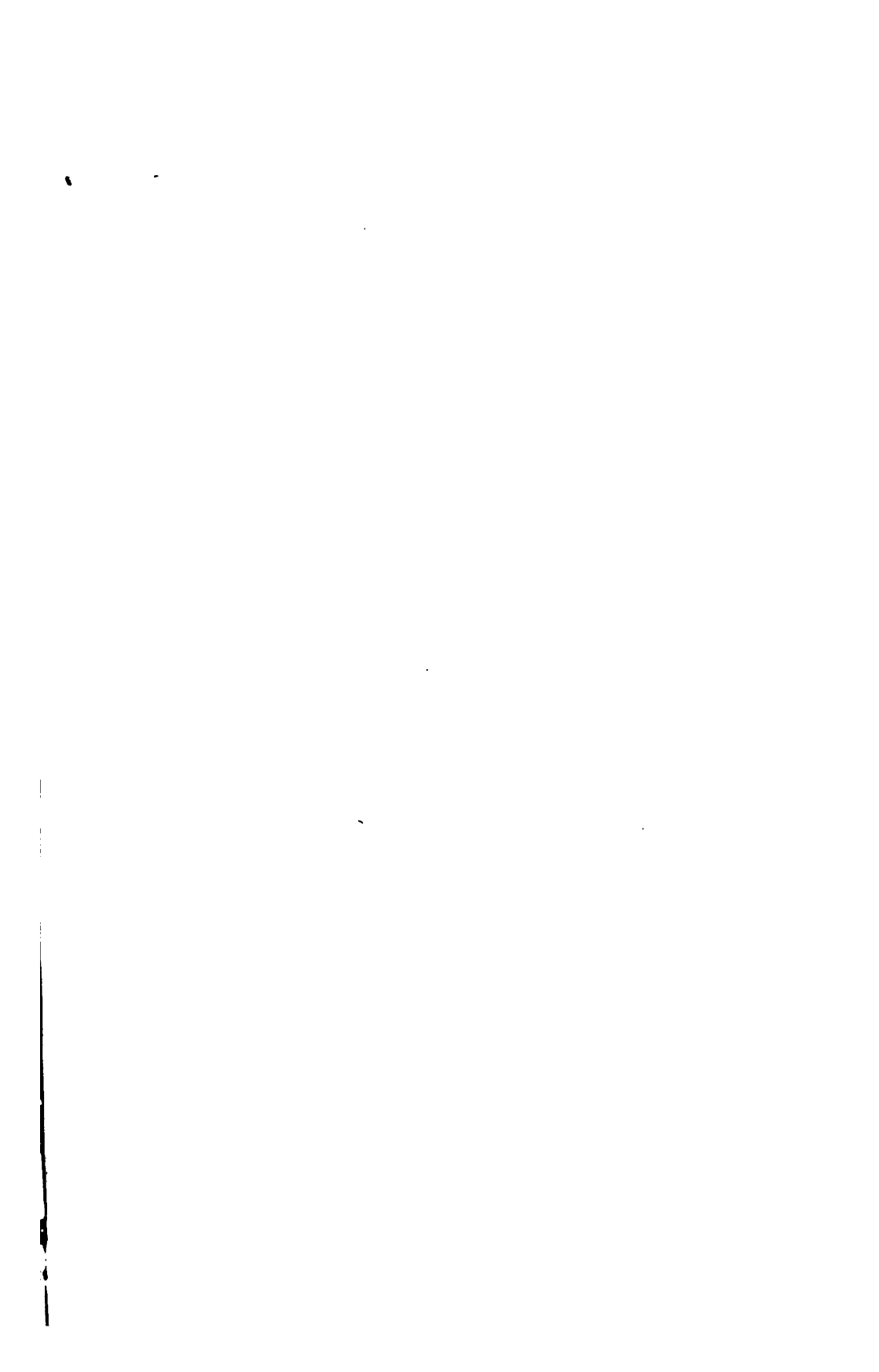
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